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No._____

In The

Supreme Court of the United States

October Term, 1998

DANIEL F. POTTS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a motorist is unreasonably detained in violation of the Fourth Amendment when an officer stops the motorist based upon an allegation of a simple traffic infraction but instead detains and questions the motorist outside the scope of a traffic stop to determine whether the motorist is involved in criminal activity, when the officer fails to address the traffic violation until two days after the stop.

Whether an officer's subjective perception that a motorist is nervous and the officer's subjective interpretation of, at worst, slightly imprecise answers to questions that were unrelated to the stated purpose of the traffic stop justify continued detention of the motorist.

Whether the prosecution constructively amends an indictment when the indictment charges the defendant only with offenses involving cocaine but the prosecution introduces evidence that the defendant was more heavily involved in marijuana, using the argument that the evidence was "inextricably intertwined."

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel F. Potts, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered February 4, 1999.

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OPINION BELOW

The District Court Judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on February 4, 1999. *United States of America v. Daniel F. Potts,* No. 97-6000 (6th Cir. 2/2/99). App. at 1.

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JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered February 2, 1999. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on February 15, 1999. Rehearing was denied on March 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV
United States Constitution, Amendment V
Title 18, United States Code, Section 1952(a) (1994)
Title 21, United States Code, Section 846 (1994)

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STATEMENT OF THE CASE

Mr. Potts respectfully petitions this Court for a writ of certiorari to review the judgment convicting him of one count of conspiracy to distribute cocaine in violation of Title 21, United States Code, Section 846 and one count of interstate travel in furtherance of the cocaine conspiracy, in violation of Title 18, United States Code, Section 1952(a). The district court had jurisdiction in this criminal case pursuant to Title 18, United States Code, Section 3231.

Mr. Potts' case exemplifies the real possibility of significant detention faced by thousands of American motorists stopped for minor traffic violations. This case illustrates the need for this Court to confirm that an officer's activities during a traffic stop must be "reasonably related in

scope" to the traffic violation. *See Terry v. Ohio*, 392 U.S. 1, 20 (1968).

In July of 1992, Mr. Potts was driving westbound on Interstate 10 through the town of Sulphur, Louisiana. Unbeknownst to Mr. Potts, the small town of Sulphur, Louisiana, has gained national notoriety for its aggressive Interstate interdiction and forfeiture program. The town's police officers have become bounty hunters. Under the applicable statutes, the Sulphur Police Department gets to keep 60 percent of any money seized and forfeited in its interdiction program. Since 1989, the City of Sulphur has seized some $5 million from motorists on the four to five mile stretch of Interstate that falls within its jurisdiction.

As Mr. Potts traveled through Sulphur, he was pulled over by Officers Chamblee and Thompson, allegedly for changing lanes without signaling and speeding. Both officers as well as their supervisor readily admitted that their goal was to stop travelers for traffic infractions and then conduct further investigation beyond the traffic offense alleged.

During the "traffic" stop, the officers never attempted to address the alleged traffic violations. In fact, the officers did not bother to write Mr. Potts a traffic citation until two days after his arrest. Rather than address the purported reason for stopping Mr. Potts, the officers, as they put it, took things "a step further" and began to interrogate Mr. Potts. The United States Court of Appeals for the Sixth Circuit's opinion

illustrates the fact that Mr. Potts was detained significantly in excess of the scope of a proper traffic stop:

> At the start of the traffic stop, Officer Chamblee reviewed Defendant's license, and asked Defendant where he was headed.[1] Defendant answered "Houston." Officer Chamblee asked Defendant what his business was in Houston, and Defendant stated that he was going to do "land, oil and gas work." Officer Chamblee asked Defendant for a business card; however, Defendant could not provide any verification to establish his employment. Officer Chamblee began to suspect that Defendant was lying about his employment. Officer Chamblee also noticed that Defendant's inflection and body language changed when he asked Defendant about his business, suggesting that Defendant was nervous.
>
> Officer Chamblee asked Defendant who he was going to work for in Texas, and Defendant answered that he worked for people in Tennessee and that the people "wanted to take on a partner" down in Texas. Officer

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[1]The officers determined that Mr. Potts' driver's license was valid.

> Chamblee interpreted this answer to be evasive and nonresponsive. The officer checked out Defendant's registration and found that it was valid. He then asked Defendant to allow him to search his vehicle, and Defendant declined. Only then did Officer Chamblee call dispatch and asked them to send him Defendant's criminal history and to send a narcotics dog.

United States v. Potts, No. 97-6000 (6th Cir. 2/2/99, App. at 12-13).

Mr. Potts was then detained outside of his car while a K-9 unit was summoned. During this time, he continued to be asked questions unrelated to any purported traffic violation. He was not free to leave.

Ultimately, a K-9 unit arrived, and the dog allegedly alerted. A full search of Mr. Potts' vehicle netted a very small amount of marijuana, and more importantly, approximately $121,000 in cash.

Well over two years later, a sealed indictment was filed in the Eastern District of Tennessee charging Mr. Potts with one count of conspiracy to possess and distribute cocaine. The government filed a Superseding Indictment on November 11, 1995. The Superseding Indictment charged Mr. Potts with one conspiracy count and one count of traveling in interstate commerce to promote unlawful activity in violation of Title 18, United States Code, Section 1952.

The only overt act alleged in the conspiracy count and the interstate travel count was based on the same factual scenario -- the 1992 incident in Sulphur, Louisiana.

Mr. Potts filed a Motion to Suppress, and after two hearings, the magistrate judge recommended that the motion be denied. (Report and Recommendation, App. at 68).[2] The District Court adopted the Report and Recommendation. (App. at 71). The presence of the unexplained cash was introduced by the government at trial and became one of its most damaging pieces of evidence.

The Superseding Indictment alleged that Mr. Potts participated in a long-term conspiracy to possess and distribute cocaine. The Indictment originally charged twelve defendants. Each was alleged to have participated in some way in a cocaine conspiracy with the "hub" of the conspiracy, Inman Ray McAndrew, a well-known and incorrigible East Tennessee drug dealer.

Although Mr. Potts was charged solely with offenses involving cocaine, shortly before trial, defense counsel became aware from certain *Jencks* material that key witnesses would allege that Mr. Potts was more heavily involved with marijuana than cocaine. Accordingly, Mr. Potts filed a Motion in *Limine* to exclude evidence of marijuana

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[2]The Report and Recommendation contains a detailed statement of the evidence.

transactions. The government responded and proffered that the marijuana evidence would be "inextricably intertwined."

The District Court ultimately allowed the prosecution to introduce evidence of marijuana transactions.

As it turned out, the vast majority of marijuana evidence was not intertwined with evidence of cocaine transactions at all. Inman Ray McAndrew, the "hub" of the conspiracy, plead guilty on the first day of trial and testified against Mr. Potts.

Although McAndrew claimed that Mr. Potts engaged in a number of cocaine transactions over the years, McAndrew essentially described Mr. Potts as someone who sold marijuana who could be persuaded to sell cocaine. McAndrew claimed that during 1991 and 1992, Mr. Potts was selling marijuana. McAndrew testified that he personally could not make money selling marijuana, but bought some on a few occasions through Mr. Potts. McAndrew claimed that he personally went three or four times to Texas and met Dan Potts. Only on one occasion did McAndrew even claim to have bought any cocaine in Texas. The other times, he bought marijuana through Mr. Potts' connection in Texas.

The government also called Wesley Dodson, a close McAndrew associate, to testify about one of these trips to Texas with Ray McAndrew. After Dodson was released from the stand, defense counsel learned that the trip Dodson described was solely for the purpose of buying marijuana. The parties agreed to stipulate that if Dodson were recalled,

he would testify that the trip did not involve any attempt to buy cocaine. Thus, his testimony was certainly not "inextricably intertwined" with evidence regarding the cocaine offenses for which Mr. Potts was on trial. Mr. McAndrew, the "hub," admitted that Mr. Potts did not even want to be involved with cocaine. Nevertheless, the United States Court of Appeals upheld the introduction of the marijuana-related evidence under a *res gestae* theory and held that it admits uncharged conduct that is "inextricably intertwined" with the charged conduct. App. at 23.

REASONS FOR GRANTING THE WRIT

I. A MOTORIST IS UNREASONABLY DETAINED IN VIOLATION OF THE FOURTH AMENDMENT WHEN AN OFFICER STOPS THE MOTORIST BASED UPON AN ALLEGATION OF A SIMPLE TRAFFIC INFRACTION BUT INSTEAD DETAINS AND QUESTIONS THE MOTORIST OUTSIDE THE SCOPE OF A TRAFFIC STOP TO DETERMINE WHETHER THE MOTORIST IS INVOLVED IN CRIMINAL ACTIVITY, WHEN THE OFFICER FAILS TO ADDRESS THE TRAFFIC VIOLATION UNTIL TWO DAYS AFTER THE STOP.

This Court should clarify that its opinion in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), does not authorize unlimited detention of a motorist for investigation unrelated to the traffic violation. In *Whren v. United States*, this Court rejected the claim that the Fourth Amendment prohibits a "pretextual" traffic stop and held that, as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. As this case illustrates, many police officers, and some lower courts, have interpreted the *Whren* decision to mean that, once an officer witnesses a

simple traffic violation, that officer has the authority and discretion to detain a motorist for a significant period of time and interrogate the motorist in the hope that the officer might discover evidence of more serious criminal conduct. In this case, the United States Court of Appeals for the Sixth Circuit approved the practice of interrogating a motorist on matters unnecessary to resolve the question of the traffic violation:

> Defendant claims that Officer Chamblee violated his Fourth Amendment rights because the officer never investigated whether he had committed the traffic violation, but rather prematurely escalated his investigation by asking him questions about his business and travel plans, calling for a criminal background check, and requesting a narcotics dog.
>
> We disagree. At the outset, we reject Defendant's claim that Officer Chamblee escalated his investigation by asking Defendant non-traffic-related questions because we have previously held that an officer is entitled to make such inquiries.

United States v. Potts, App. at 11, *citing United States v. Erwin*, 155 F.3d 818 (6th Cir. 1998)(*en banc*).

The United States Court of Appeals for the Sixth Circuit has not established a meaningful standard by which to judge the reasonableness of a detention under these circumstances. The Court merely holds that, "An officer has substantial discretion in how he conducts a traffic stop." *Potts*, App. at 9. The court goes on to say that a driver does not have to be

released, even when a law enforcement officer determines that the driver has not even engaged in the particular conduct for which he was detained. App. at 9-10.

This Court should grant certiorari in order to establish a simple but flexible standard to emphasize that an officer must at least be addressing the purported traffic stop while detaining the motorist.

The ruling of the United States Court of Appeals for the Sixth Circuit in this case and others both conflicts with the decisions of a number of other circuit courts of appeal and conflicts with the spirit of this Court's recent opinion in *Knowles v. Iowa*, ____ U.S. _____, 119 S.Ct. 484 (1998). The dissenting opinion of the Honorable John R. Gibson explains the constitutional similarity to *Knowles*. *Potts*, App. at 35-41 (dissenting opinion). In *Knowles*, this Court held that, notwithstanding state law permitting an officer to arrest a motorist for a traffic violation, the fact of a traffic violation and issuance of a citation did not justify a full search of the car. The constitutional violation in this case is no less tangible than in *Knowles*. In *Knowles*, the officers used a traffic violation to justify a search and seizure that was unrelated to any law enforcement needs regarding the traffic violation. Similarly, here, what is occurring is that officers are using a traffic violation to detain and interrogate an individual beyond what is necessary to resolve the traffic violation.

What is most disturbing about this ruling is the court's determination that the authorities had constitutional authority for their actions because the officer had not written Mr. Potts a ticket or indicated to Mr. Potts how his traffic violation would be resolved. *Potts*, App. at 13. Here, the Court adopted the magistrate judge's reasoning that the officers' investigation and interrogation of Mr. Potts was reasonable because it could have taken the officers just as long had they elected to write Mr. Potts a traffic ticket. (Magistrate Judge's Report and Recommendation, App. at 65-66). This is an issue of exceptional importance because the reasoning adopted in Mr. Potts' case encourages officers to artificially delay writing a ticket because the court has indicated that an officer is authorized to detain a motorist until the officer writes a ticket or tells the motorist how the traffic violation would be resolved. As noted, in Mr. Potts' case, the officer chose not to write Mr. Potts a traffic citation until two days after the initial encounter. Surely, there must be a requirement that the officers' investigation remain reasonably related in scope to the original reason for the stop.

Contrary to the reasoning adopted by the Sixth Circuit, this Court has previously stated that whether officers "acted less than diligently, or . . . unnecessarily prolonged [a suspect's] detention" are factors considered in determining the legality of a seizure. *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

Most importantly, the approach taken by the United States Court of Appeals for the Sixth Circuit in this regard is in direct conflict with this Court's decision in *Terry v. Ohio*. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under *Terry*, detention is only warranted when it is "justified at its inception and . . . **reasonably related in scope** to the circumstances which justified the interference in the first place." *Id.*, 392 U.S. at 20 (emphasis added). This Court should grant certiorari to make it clear to the lower courts that *Whren* must be read in the context of *Terry v. Ohio*. Although an officer may stop a motorist based upon any traffic violation, the detention must be "reasonably related in scope" to the circumstances of the traffic violation which justified the stop in the first place. *Id.* Such a standard would certainly not hamper law enforcement efforts.

The Sixth Circuit's holding also directly conflicts with this Court's direction in *Florida v. Royer*, 460 U.S. 491, 500 (1983), that any detention must be "temporary and last no longer than is necessary to effectuate the purpose of the stop." *See also Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 2135 (1993).

The reason that this issue is so important is that this simple standard is designed to protect innocent people. Almost every motorist inadvertently violates a traffic ordinance on a regular basis. While officers undoubtedly have the authority to stop any individual who violates a traffic ordinance, it must be noted that the vast majority of those

individuals will be completely innocent of more serious criminal conduct. Thus, the reasonable limits urged here are not only in conformity with this Court's prior precedent, they are designed to protect thousands of completely innocent motorists.

The level of discretion bestowed upon all police officers by the United States Court of Appeals for the Sixth Circuit is in direct conflict with this Court's ruling in *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980). In *Reid*, the Court rejected the government's argument that certain conduct by a traveler amounted to reasonable suspicion when the "circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.* at 448 U.S. 441. The lower court's ruling in this case would subject an even larger category of innocent travelers to detention of an indeterminate length and character.

The Sixth Circuit's rule is also in direct conflict with other circuits. For example, the Tenth Circuit has confirmed that officers have the authority to detain a motorist while addressing issues directly related to a potential violation of traffic laws:

> An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. When the

> driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.

United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1996), *cert. denied*, 511 U.S. 1095 (1984).

A brief review of just a few of the recent cases on the issue of whether an officer is limited to the scope of a traffic stop illustrates the need for this Court's review in order to encourage uniformity in a very common situation. For example, a recent case from the United States Court of Appeals for the Eleventh Circuit addresses almost the same factual scenario as Mr. Pott's case and reaches the opposite result. *United States v. Pruitt*, No. 97-6217, 1999 U.S. App. LEXIS 8769 (11th Cir. 5/10/99). In *Pruitt*, the court followed this Court's admonition that investigation must be reasonably related in scope to the purpose of the initial seizure. The court addressed a situation in which an individual was pulled over for speeding, and rather than addressing the alleged traffic violation, the officer began asking unrelated questions like what the defendant did for a living and how much his vehicle cost -- questions very similar to those in Mr. Potts' case. The Eleventh Circuit condemned this type of fishing expedition as unjustified by the traffic violation.

Compare also United States v. Walker, 933 F.2d 812, 816 (10th Cir. 1991) (finding Fourth Amendment violation where "[i]nstead of issuing a citation, [the officer] decided to detain

the defendant and conduct an inquiry into matters unrelated to the traffic stop"; *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (emphasizing that when an initial stop is justified by a traffic violation, police need separate justification to detain beyond the time necessary to issue a citation); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995) ("once the initial purposes of a traffic stop are completed," an officer is prohibited from further detaining the motorist unless something occurs within the scope of the traffic stop that "generates the necessary reasonable articulable suspicion to justify a further detention"; *with United States v. Owens*, 167 F.3d 739, 748-49 (1st Cir. 1999) (upholding fifty minute investigative detention after traffic stop); *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir. 1998) (*en banc*) (officer not required to end the stop once the officer determines that the driver did not commit the traffic offense for which he was stopped)[3];*United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998) (although scope and duration of detention are limited to what is necessary to fulfill the purpose of the

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[3]The Sixth Circuit's decision in Mr. Potts' case acknowledged the differences in its approach to the same question in *Erwin* and *Mesa*. App. at 9-11. While an intra-circuit conflict is not traditionally seen as a reason for this Court to exercise its jurisdiction, this conflict emphasizes the fact that the lower courts are often taking very different approaches to determining what is permissible during a traffic stop.

seizure, further detention was warranted because officer received information that the suspect was dangerous).

Because the traffic stop is probably the most common police/citizen encounter, it is of utmost importance for this Court to limit the scope of traffic stops to the reason for the stop, unless independent suspicion is developed during the encounter.

II. AN OFFICER'S SUBJECTIVE PERCEPTION THAT A MOTORIST IS NERVOUS AND THE OFFICER'S SUBJECTIVE INTERPRETATION OF, AT WORST, SLIGHTLY IMPRECISE ANSWERS TO QUESTIONS THAT WERE UNRELATED TO THE STATED PURPOSE OF THE TRAFFIC STOP DO NOT JUSTIFY CONTINUED DETENTION OF THE MOTORIST.

As set out in the Statement of the Case, the United States Court of Appeals for the Sixth Circuit has ruled that it is "clear" that an officer develops constitutionally reasonable articulable suspicion when questioning a motorist about his business activities, unrelated to the purpose of the stop, and the individual becomes nervous and the officer decides that an answer to a question was evasive and nonresponsive. This ruling is squarely at odds with this Court's precedent regarding what is required to establish reasonable articulable suspicion. The ruling places the Sixth Circuit in conflict with a number of other circuits which have held that reasonable suspicion requires more than innocent activities or mannerisms which would be very common to anyone traveling on an interstate highway when pulled over by police officers. The importance of this issue cannot be overstated in light of the fact that observations such as those in this case could be made by any officer of any motorist stopped on the Interstate Highway.

First, the ruling by the United States Court of Appeals for the Sixth Circuit directly contradicts this Court's pronouncements regarding reasonable suspicion in *Reid v. Georgia*, 448 U.S. 438 (1980). In *Reid*, the defendant had arrived at the Atlanta airport from Fort Lauderdale early in the morning. As the passengers left the plane single file, the defendant was observed by a DEA agent to be separated by several persons from another individual who carried a similar shoulder bag. The defendant occasionally looked backwards in the direction of the second man. When the suspects reached the main lobby of the terminal, the second individual caught up with the defendant and spoke briefly with him, and then the two left the building together. The DEA agent approached the two and examined their airline ticket stubs. The agent testified that the two appeared nervous during the encounter. *Id.* at 439.

This Court concluded, "that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances." *Id.* at 441. What particularly troubled this Court was that the court below had determined there were grounds for the detention based upon circumstances that "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures for the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.* at 441. Mr. Potts respectfully asks this Court to grant his Petition for Writ of

Certiorari in order to confirm that more is required than observations that could apply to almost any motorist. The officers must be able to point to objective facts which would link the suspect to specific criminal activity, rather than just individually and subjectively determining that an individual was suspicious.

Similarly, the factors relied upon by the court to justify determination of reasonable suspicion conflict with a number of circuit court decisions because those factors are "ubiquitous in modern interstate travel" and do "not serve to separate the suspicious from the innocent traveler." *Karnes v. Skrutski*, 62 F.3d 485, 496 (3d Cir. 1995).

The fact that an officer determined that Mr. Potts appeared nervous is particularly lacking in probative value. As the dissent of the Honorable John R. Gibson in Mr. Potts' case, points out, "[n]ervousness and slightly imprecise responses to police queries are surely the rule, not the exception, in citizen behavior during traffic stops." App. at 40.

There are a number of circuit court decisions supporting Judge Gibson's dissent in reasonably restricting the use of the common characteristic of nervousness to justify detention. As the Tenth Circuit has stated:

> We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either driver or

> passenger as a basis for reasonable suspicion "in all cases of this kind must be treated with caution . . .."

United States v. Fernandez, 18 F.3d 874-879 (10th Cir. 1994) *(quoting United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992)).

Additionally, if nervousness is to be used at all, there should be objective indicia rather than the subjective statements that defendant's demeanor appeared to change or that he appeared nervous. *See, United States v. Bloom*, 975 F.2d 1447, 1458 (10th Cir. 1992) (finding that agent's "statement that Defendant appeared 'very nervous' and 'somewhat excited' is a subjective evaluation of Defendant's behavior" and insufficient).

The factors relied upon by the United States Court of Appeals for the Sixth Circuit indicate, at best, that Mr. Potts was not comfortable with being interrogated on the side of an Interstate Highway about matters unrelated to what he had been told was the reason for the stop. In determining whether the observations related by the officers amounted to objective indicia of criminal conduct, it might be helpful to consider whether *anyone* would have been comfortable with the situation. Similar observations could be made about any motorist.

The majority opinion acknowledges that its determination of reasonable suspicion is based upon innocent activity:

> At the first motion to suppress hearing, Officer Chamblee explained that he detained Defendant

> because Defendant answered his questions evasively, appeared nervous, and appeared to be making up his answers to questions. An officer could not build reasonable articulable suspicion on any one of these factors alone. Collectively, however, they suffice.

Potts, App. at 11 (citations omitted).

This case would provide this Court with a good factual scenario with which to clarify to the lower courts to what extent innocent activity can be aggravated to establish reasonable suspicion. Mr. Potts respectfully suggests that this Court should emphasize that the circumstances should point to some particularized criminal activity, rather than simply indicating that the motorist is uncomfortable with the situation.

Several courts have taken the more reasonable position that, to be used in a determination of reasonable suspicion, factors must point to particularized criminal activity rather than activities that are very common to the general public. *E.g., United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997) ("The possession of open maps and a vestige of fast food meals described a very large category of presumably innocent travelers.") *(citing Reid*, 448 U.S. at 441); *United States v. Rodriquez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir. 1994) (stating that a "gloss on this rule prohibits reasonable suspicion from being based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person be stopped").

The dissent in Mr. Potts' case was correct to point out that what occurred in Mr. Potts' case was no more constitutionally acceptable than what this Court recently struck down in *Knowles v. Iowa*, ____ U.S. _____, 119 S.Ct. 484 (1998). Because Mr. Potts did not exhibit any characteristics that were unusual for a motorist in his situation, to detain him for a period of time while the officers could summon a K-9 unit was no more permissible than a policy which allowed a search and seizure any time a simple traffic violation was observed.

III. THE PROSECUTION CONSTRUCTIVELY AMENDS AN INDICTMENT WHEN THE INDICTMENT CHARGES THE DEFENDANT ONLY WITH OFFENSES INVOLVING COCAINE BUT THE PROSECUTION INTRODUCES EVIDENCE THAT THE DEFENDANT WAS MORE HEAVILY INVOLVED IN MARIJUANA, USING THE ARGUMENT THAT THE EVIDENCE WAS "INEXTRICABLY INTERTWINED."

The indictment in this case charged Mr. Potts with participating in a conspiracy to possess and distribute cocaine hydrochloride and with traveling in interstate commerce to promote this cocaine conspiracy. The indictment did not charge Mr. Potts with involvement with marijuana.

When it became evident from certain *Jencks* material that key witnesses would allege that Mr. Potts was more heavily involved with marijuana than cocaine, Mr. Potts filed a motion *in limine* to exclude evidence of this uncharged conduct. The government responded with the argument that it must introduce the evidence of marijuana because the marijuana activity was "inextricably intertwined" with the cocaine.

At trial the government introduced the testimony of Inman Ray McAndrew, the alleged "hub" of the conspiracy. Mr. McAndrew essentially characterized Mr. Potts as a marijuana dealer who would engage in cocaine transactions from time to time but did not want to do so.

The United States Court of Appeals for the Sixth Circuit rejected Mr. Potts' argument that the prosecution had constructively amended the indictment by holding that "[w]e allow the trial court to admit evidence regarding a defendant's unindicted criminal activity when that activity is 'intrinsic' or 'inextricably intertwined' with charges named in the indictment." *Potts*, App. at 23. The court held that the government's evidence of marijuana dealing "was intrinsic evidence because it was so blended and connected with the cocaine conspiracy transactions he was indicted for, that the evidence of the two could not be presented separately." *Potts*, App. at 25.

If the evidence truly could not have been presented separately, there was certainly a constructive amendment of the indictment. The government, knowing that it intended to attempt to prove Mr. Potts guilty of a conspiracy involving both cocaine and marijuana, chose to charge Mr. Potts only with a conspiracy involving cocaine, a substance which carries a significantly higher sentence than marijuana. *See United States v. Dale*, No. 97-6082, 1999 U.S. App. LEXIS 10841 (6th Cir. 5/27/99).

If this evidence was indeed inextricably intertwined, the government pursued an indictment that did not accurately describe the conspiracy.

The result is that Mr. Potts was charged with a conspiracy other than the one that the government attempted to prove at trial. The government knew that it intended to prove a conspiracy in which marijuana and cocaine were inextricably intertwined, yet failed to place Mr. Potts on notice that marijuana was charged.

The Sixth Circuit's holding is in conflict with long established precedent of this Court. In *United States v. Stirone*, 361 U.S. 212 (1960), this Court reversed when the defendant had been charged with Hobbs Act interference with importation of sand but the court allowed the government to present a theory of interference with exportation of steel.

The United States Court of Appeals for the Sixth Circuit's ruling also conflicts with other Circuit precedent. For

example, the First Circuit has taken a position much more consistent with *Stirone*. In *United States v. Glenn*, 828 F.2d 855, 857-860 (1st Cir. 1987), then Judge Breyer explained that where a defendant as charged with a conspiracy to import marijuana from Thailand and hashish from Pakistan, but the evidence showed only that he conspired to import the marijuana and not the hashish, a fatal amendment of the indictment occurred. This approach shows the appropriate respect for a defendant's right to be tried on the charges on which the Grand Jury has given notice.

Prejudice to Mr. Potts

By adopting this "inextricably intertwined" theory, the court has allowed the government to charge Mr. Potts with an offense that carries a very high sentence, yet offer proof that Mr. Potts was guilty of selling marijuana. There is a substantial danger that the jury convicted Mr. Potts because they concluded that he was a marijuana dealer and did not want to find him not guilty, although the proof regarding the charged conduct was weaker.

Mr. Potts was certainly deprived of his right to be tried on the charges as considered and presented to the Grand Jury. The prejudice to Mr. Potts was real, as is illustrated by the United States Court of Appeals' recent treatment of a similarly situated individual in *United States v. Dale*, No. 97-6082, 1999 U.S. App. LEXIS 10841 (6th Cir. 5/27/99).

Mr. Dale was convicted of one count of conspiracy to distribute cocaine base and marijuana. As the Court pointed out, when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the drug carrying the lower penalty. *Id.*

In Mr. Potts' case, the evidence from the government's own witnesses indicated that Mr. Potts' involvement was primarily with marijuana. Yet by charging Mr. Potts in a manner that was inconsistent with the idea that the activity was "inextricably intertwined" and thus part of the same conspiracy, Mr. Potts lost the right to argue that his sentencing should have been governed by marijuana as Mr. Dale was able to do.

The *Dale* court indicated that the trial court could have used special interrogatories to determine whether the jury would find the defendant guilty of cocaine, marijuana or both. Had Mr. Potts had this opportunity, he could have strongly argued to the jury that he was not guilty of the cocaine charges but had in fact engaged only in marijuana transactions, on which the proof was stronger and the sentence lower.

The disparate treatment between Mr. Potts and Mr. Dale was caused by the fact that the government charged Mr. Potts in a manner inconsistent with the government's claims that the activity was "inextricably intertwined." The resulting

constructive amendment of the indictment caused disparate treatment that not only violated Mr. Pott's right to be tried only on the charges presented by the Grand Jury pursuant to the Fifth Amendment to the United States Constitution but also raises important Equal Protection and Due Process concerns.

Given the power that the prosecutor has to define charges, this issue is extremely important for this Court to address. This Court should require that a prosecutor who expects to prove that a conspiracy has separate illegal objectives that are "inextricably intertwined" to be responsible for seeing that the defendant is charged in accordance with the "intertwined" proof the government will bring before the jury. This issue should be addressed to insure protection of the basic right to be apprised of the nature of the charges.

Should the Court not be inclined to find a constructive amendment when the government intends to present "inextricably intertwined" charges but fails to present them in an indictment, Mr. Potts suggests that the Court should assist the lower courts by setting a standard for when uncharged conduct can be admitted without resulting in amendment. The facts of Mr. Potts case present the Court with an excellent opportunity to address those standards.

The evidence of marijuana could easily have been kept out of this trial. As set out in the Statement of the Case, Mr. McAndrew, the "hub" of the conspiracy testified that Mr.

Potts did not really want to deal cocaine. McAndrew testified about several trips to Houston during which he met Mr. Potts regarding drugs, but only one trip involved cocaine. The government had another former codefendant testify about one of these Houston trips when it was late admitted by the prosecution that the trip did not involve any attempt to purchase cocaine.

Perhaps most importantly, according to "hub" McAndrew, the 1992 Sulphur incident in which Mr. Potts was found to be in possession of one hundred twenty-one thousand dollars could not have involved the charged cocaine conspiracy. McAndrew himself testified that neither he nor his associates were involved in cocaine at that time because he and Mr. Dotson were both imprisoned at the time. The government did not even ask Mr. McAndrew whether he knew about Mr. Potts' trip or arrest. Thus, the charge of interstate travel in furtherance of the charged conspiracy had no factual basis. In fact, rather than being "inextricably intertwined" the factual basis for this prosecution consisted of significant testimony about alleged criminal conduct that could not as a matter of law relate to the charged conspiracy.

Accordingly, Mr. Potts respectfully asks this Court to clarify the standards to be used when the Grand Jury returns an indictment regarding a specific charge but the government proposes to broaden the proof to include more extensive

conduct, but conduct that would carry a lesser sentence if charged.

CONCLUSION

Mr. Potts respectfully prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in order to clarify the scope of police authority when making a simple traffic stop and the extent to which the prosecution can introduce extensive uncharged conduct by arguing that the conduct is "inextricably intertwined" with the charged conduct.

Respectfully submitted,

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Counsel for Petitioner

No._____

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In The

Supreme Court of the United States

October Term, Year 1998

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DANIEL F. POTTS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---------- ♦ ----------

Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

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APPENDIX

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
DANIEL F.
POTTS, Defendant-Appellant.
No. 97-6000
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
1999 U.S. App. LEXIS 1625
February 2, 1999, Filed

NOTICE: **[*1]** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. 94-00163. Jarvis. 7-29-97.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Hugh B. Ward, Jr., David P. Folmar, Jr., Asst. U.S. Attorneys, Office of the U.S. Attorney, Knoxville, TN.

For DANIEL F. POTTS, Defendant - Appellant: W. Thomas Dillard, Wade V. Davies, Ritchie, Fels & Dillard, Knoxville, TN.

JUDGES: BEFORE: NELSON, CLAY & GIBSON, * Circuit Judges. JOHN R. GIBSON, Circuit Judge, dissenting.

* The Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION BY: CLAY

OPINION: CLAY, Circuit Judge. Defendant, Daniel F. Potts, appeals from the order entering his convictions for conspiracy to distribute cocaine, in violation of *21 U.S.C. § 846* (1994), and interstate **[*2]** travel in furtherance of a cocaine conspiracy, in violation of *18 U.S.C. § 1952*(a) (1994). Defendant alleges that the Government offered insufficient evidence to prove his charges. Defendant also alleges that the district court erred when it admitted evidence recovered from him during a traffic stop because the officers conducting the stop violated his rights under the Fourth Amendment.

Defendant further argues that the district court erred when it admitted evidence showing that he had entered a drug forfeiture settlement and evidence showing that a narcotics dog alerted on his car.

We hold that the Government presented sufficient evidence to sustain Defendant's convictions. We further conclude that the district court did not err when it admitted the evidence recovered from Defendant during the traffic stop because the officers conducting the stop acted within the scope of their authority. Additionally, we find that the district court did not err when it admitted evidence showing that a narcotics dog alerted on Defendant's car, and that it committed harmless error when it admitted the evidence regarding Defendant's drug forfeiture settlement. Based on these grounds, we AFFIRM the **[*3]** judgment of the district court.

I. BACKGROUND

On July 15, 1992, at 5:09 PM, Police Officers Chamblee and Thompson of the Sulphur, Louisiana Police Department stopped Defendant en route to Houston, Texas on Interstate 10, because Defendant changed lanes without signaling and because he was speeding. During the first three minutes of the stop, Defendant presented Officer Chamblee with his driver's license and registration. Both documents were valid. Officer Chamblee began questioning Defendant about his business and travel plans. Defendant directly answered Officer

Chamblee's questions about his travel plans; however he appeared evasive and nervous when he answered questions about his business. Officer Chamblee also suspected that Defendant was making up his answers to the business-related questions. Officer Chamblee asked Defendant for a business card in order to verify Defendant's employment, and Defendant could not provide any documentation to confirm his employment. Officer Chamblee asked Defendant if he could search Defendant's car, but Defendant declined to consent to a search.

Four minutes into the traffic stop, Officer Chamblee asked dispatch to radio Defendant's **[*4]** criminal history, and asked to have a narcotics dog sent to the scene. Eight minutes into the traffic stop, dispatch informed Officer Chamblee that Defendant had been arrested in 1975 on a marijuana charge. The narcotics dog arrived at the traffic stop scene at the same time. The dog examined Defendant's car for three minutes and then alerted that there were narcotics in Defendant's trunk and in the back left side of Defendant's car. After the dog alerted on Defendant's vehicle, Officers Chamblee and Thompson searched Defendant's car. The officers found approximately $121,000 in cash and a small quantity of marijuana in the car. Officer Chamblee placed Defendant under arrest for marijuana possession, impounded Defendant's car, and confiscated the money found inside the car. The following day, Officer Chamblee searched Defendant's car more intensively and he discovered a secret compartment of

approximately the size and shape needed to transport kilograms of cocaine. Two days after the arrest, Officer Chamblee wrote Defendant a traffic citation for speeding and changing lanes without signaling. The State of Louisiana also brought a forfeiture claim against Defendant's car and the money **[*5]** found inside. Defendant did not contest the forfeiture; he voluntarily relinquished his car and most of the money found in his vehicle in exchange for the state's promise that it would not prosecute him based on the drug evidence found in his vehicle. On November 22, 1995, the Government issued a nineteen-count superceding indictment naming Defendant, ten other co-conspirators, and the cocaine conspiracy leader, Ray McAndrew, in the charges. Defendant was specifically named in two of the indictment counts: Count One, conspiracy to distribute cocaine, in violation of *21 U.S.C. § 846,* and Count Twelve, interstate travel in furtherance of the conspiracy, in violation of *18 U.S.C. § 1952*(a).

Prior to trial, Defendant filed a motion to suppress the evidence discovered during the July 16, 1992, traffic stop. A magistrate judge heard Defendant's motion on September 30, 1996. The magistrate judge determined that the officers conducting the stop had acted legally, and therefore evidence collected pursuant to the traffic stop was admissible. Defendant filed a motion with the district court objecting to the magistrate's recommendation. The district court rejected Defendant's objections and **[*6]** ruled that the evidence was

admissible. Defendant renewed his motion to suppress the traffic stop evidence on two occasions, and the district court denied both motions. Defendant also filed a pretrial motion to exclude the evidence regarding his drug forfeiture settlement with the state of Louisiana and the trial court granted his motion, ruling that the evidence was inadmissible under Federal Rule of Evidence 408.

On April 7, 1997, Defendant was tried on the cocaine conspiracy charge and the interstate travel in furtherance of the conspiracy charge. McAndrew, testifying as a Government witness, established that Defendant associated with him and assisted him from 1984 to 1992. Specifically, McAndrew testified that in 1984, he gave Defendant two kilograms of cocaine on credit, with the expectation that Defendant would share the proceeds from the drugs' sale with him. McAndrew further testified that when he was sent to jail in 1984, he referred Defendant to Mark Roberts in order to provide Defendant with an alternate purchaser for Defendant's cocaine. McAndrew also testified that Defendant continued to sell Roberts cocaine for several years. McAndrew further established that, during [*7] his period of incarceration in the 1980s, Defendant referred an attorney to McAndrew to help him get a lesser sentence. McAndrew also testified that Defendant visited him in jail and discussed drugs, and that he helped Defendant secure a loan from his father to facilitate Defendant's drug selling scheme. McAndrew also testified that Defendant resumed selling McAndrew cocaine after

McAndrew was released from jail in the early 1990's. McAndrew explained that during this period he grew frustrated with his regular cocaine supplier and he increasingly relied on Defendant to provide him with cocaine in Knoxville, Tennessee and Texas. McAndrew also testified that he sent his courier, Wesley Dodson, to pick up cocaine from sources in Texas that Defendant had identified.

At trial, the Government elicited testimony from a police officer about the drug forfeiture settlement Defendant had entered. Defendant filed a motion for mistrial, arguing that the evidence had prejudiced his case. The trial judge denied Defendant's motion, but issued a curative instruction to the jury to remedy any resulting prejudice from the evidence.

At the close of trial, Defendant filed a motion for acquittal, arguing **[*8]** that the Government had failed to prove his charges for conspiracy to distribute cocaine and interstate travel in furtherance of the conspiracy. The court denied Defendant's motion. On April 11, 1997, a jury found Defendant guilty of the two charges. On July 22, 1997, the court sentenced Defendant to eighty-seven months imprisonment, to be followed by a four-year term of supervised release, and 250 hours of community service. Defendant timely filed the current appeal.

II. DISCUSSION

A. Traffic Stop Evidence

We review a district court's ruling on a motion to suppress evidence under a dual standard: the district court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. See *United States v. Bradshaw, 102 F.3d 204, 209 (6th Cir. 1996).* We review the evidence in the light most favorable to the district court's determination. See id. The district court adopted a magistrate judge's report and recommendations when it determined that the traffic stop was legal. Defendant's appeal raises issues concerning some of the magistrate judge's subsidiary findings. When these issues are raised, we review the magistrate's findings de novo. **[*9]** See *Massey v. City of Ferndale, 7 F.3d 506, 510-511 (6th Cir. 1993); 28 U.S.C. § 636*(b)(1)(A) (noting that a magistrate may only issue recommendations on a motion to suppress evidence and these recommendations must be reviewed by an Article III court if a magistrate's ruling is appealed).

Defendant alleges that the district court erred when it adopted the magistrate judge's recommendation to admit the evidence that Officers Chamblee and Thompson recovered from him during the traffic stop. Defendant alleges that the officers never investigated him for a traffic violation, but instead immediately began trying to build probable cause to search his car for drugs. Defendant argues that the officers started a general criminal investigation minutes after they detained his vehicle.

Traffic stops are analyzed under a Fourth Amendment analysis similar to the one used to examine Terry stops. See

United States v. Palomino, 100 F.3d 446, 449 (6th Cir. 1996) (discussing *Terry v. Ohio, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).* We examine the circumstances of the traffic stop to determine whether, when an officer stopped a vehicle, he had reasonable articulable suspicion that criminal activity was **[*10]** afoot, or "probable cause to believe that a traffic violation has occurred or was occurring. . . ." *Bradshaw, 102 F.3d at 210* (noting that probable cause to believe a traffic violation has occurred is justification for a stop); see also *United States v. Erwin, 155 F.3d 818, 1998 WL 633705,* *3 (6th Cir. 1998) (en banc) (noting that reasonable articulable suspicion that a driver is involved in criminal activity is justification for a stop). We do not examine an officer's motives in conducting a stop; our inquiry is confined to determining "'whether the particular officer in fact had probable cause to believe that a traffic offense . . . occurred regardless of whether this was the only basis for the stop or merely one basis for the stop.'" *Bradshaw, 102 F.3d at 210* (quoting *United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993)).*

This Circuit has recognized that an officer has substantial discretion in how he conducts a traffic stop. In United States v. Erwin, we held that "the Constitution does not mandate that a driver, after being lawfully detained for a suspicion of criminal activity, must be released and sent on his way without further questioning, once the law **[*11]** enforcement officer determines that the driver has not, in fact, engaged in

the particular criminal conduct for which he was temporarily detained." *Erwin, 1998 WL 633705,* at *1; see also *United States v. Guimond, 116 F.3d 166, 170 (6th Cir. 1997)* (noting that a two to three minute period of questioning after the resolution of a traffic stop doe s not necessarily violate the Fourth Amendment). In United States v. Mesa, we articulated a more conservative rule, explaining that "once the initial purposes of a traffic stop are completed," an officer is prohibited from further detaining a vehicle or its occupants unless something has occurred during the traffic stop that "generates the necessary reasonable articulable suspicion to justify a further detention." *United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995).* Mesa has not been overruled, and therefore, when an individual is questioned after a traffic stop has been resolved, we scrutinize the events to insure that the officer questions a driver in an informal, non-coercive manner.

It is well established that an officer is free to ask traffic-related questions, and questions about a driver's identity, business **[*12]** and his travel plans during the course of a traffic stop. See *Erwin, 1998 WL 633705,* at *3. In this Circuit, a "law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions." Id. at *3 (citing *Florida v. Royer, 460 U.S. 491, 497, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983)).*

Defendant claims that Officer Chamblee violated his Fourth Amendment rights because the officer never investigated whether he had committed the traffic violation, but rather prematurely escalated his investigation by asking him questions about his business and travel plans, calling for a criminal background check, and requesting a narcotics dog.

We disagree. At the outset, we reject Defendant's claim that Officer Chamblee escalated his investigation by asking Defendant non traffic-related questions because we have previously held that an officer is entitled to make such inquiries. See *Erwin, 1998 WL 633705,* at *3. Indeed, here Defendant's answers to the officer's questions and his demeanor "generated the necessary reasonable **[*13]** articulable suspicion to justify a further detention." *Mesa, 62 F.3d at 162.* At the first motion to suppress hearing, Officer Chamblee explained that he detained Defendant because Defendant answered his questions evasively, appeared nervous, and appeared to be making up his answers to questions. An officer could not build reasonable articulable suspicion on any one of these factors alone. See *Erwin, 1998 WL 633705,* at *3. Collectively, however, they suffice. See id.

Additionally, we reject Defendant's claim that Officer Chamblee artificially lengthened the stop by requesting his criminal history and the narcotics dog. We have held that "the request for back-up or a canine unit is not itself a search, nor does it make the search invalid." *United States v. Morales,*

145 F.3d 1334, 1998 WL 211746 (6th Cir. 1998) (unpublished). At best, the allegation that an officer called for additional assistance too early in a traffic stop raises questions about an officer's credibility. n1 See id. Defendant has not identified enough facts on appeal to suggest that the district court erred when it accepted the magistrate judge's finding that Officer Chamblee's testimony **[*14]** was credible.

n1 We review questions about an officer's credibility for clear error on appeal from the district court. See *Morales, 145 F.3d 1334, 1998 WL 211746* at *4 (6th Cir. 1998). However. Defendant's claim challenges the magistrate judge's determinations about the officers credibility, and is subject to de novo review. See *Massey, 7 F.3d at 510-511* (noting that findings of fact and conclusions of law in a magistrate's report and recommendation are reviewed de novo).

A close review of the facts of the traffic stop reveals that Officer Chamblee properly developed reasonable articulable suspicion. We determine whether an officer properly developed reasonable articulable suspicion during a traffic stop under a "totality of the circumstances" test. See *Erwin, 1998 WL 633705,* at *3. At the start of the traffic stop, Officer Chamblee reviewed Defendant's license, and asked Defendant where he was headed. Defendant answered "Houston." Officer Chamblee asked Defendant what his business **[*15]** was in Houston, and Defendant stated that he was going to do "land, oil and gas work." Officer Chamblee asked Defendant

for a business card; however, Defendant could not provide any verification to establish his employment. Officer Chamblee began to suspect that Defendant was lying about his employment. Officer Chamblee also noticed that Defendant's inflection and body language changed when he asked Defendant about his business, suggesting that Defendant was nervous

Officer Chamblee asked Defendant who he was going to work for in Texas, and Defendant answered that he worked for people in Tennessee and that the people "wanted to take on a partner" down in Texas. Officer Chamblee interpreted this answer to be evasive and non-responsive. The officer checked out Defendant's registration and found that it was valid. He then asked Defendant to allow him to search his vehicle, and Defendant declined. Only then did Officer Chamblee call dispatch and ask them to send him Defendant's criminal history and to send a narcotics dog.

Upon review of the facts, it is clear that Officer Chamblee developed reasonable articulable suspicion before he called for additional assistance. See *Mesa, 62* ***[*16]*** *F.3d at 162.* Significantly, Officer Chamblee had not written Defendant a ticket or indicated to Defendant how Defendant's traffic violation would be resolved and therefore, he was still authorized to detain Defendant when he called dispatch for these additional investigatory measures. See id.

Given our finding that Officer Chamblee developed reasonable articulable suspicion before he began investigating

Defendant for criminal activity, we hold that the trial court did not err when it ruled that the traffic stop evidence was admissible.

B. Challenges to the Sufficiency of the Evidence

1. Sufficiency of the Evidence on the Conspiracy Charge

When we review challenges to the sufficiency of the evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See *United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)).*

In order to prove that a Defendant participated in a conspiracy to distribute cocaine, the Government **[*17]** must show that (1) there was an agreement between two or more people to violate the drug laws, and (2) that each conspirator knew or intended to join and participate in the conspiracy. See *United States v. Elder, 90 F.3d 1110, 1120 (6th Cir. 1996)* (citing *United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993)).*

Defendant alleges that the Government failed to prove that he participated in the conspiracy to distribute cocaine charged

in his indictment because the indictment alleged that the conspiracy ran from 1984 to 1995 and the evidence presented at trial showed that the conspirators formed several discrete cocaine conspiracies during these years. Additionally, Defendant argues that the Government failed to prove that he was a co-conspirator because the Government's proof showed that he had a minimal role in the various conspiracies. Lastly, Defendant argues that the Government constructively amended the charges in his indictment because he was charged with participating in a cocaine conspiracy and the Government's evidence showed that he was involved in a conspiracy to distribute cocaine and marijuana. We reject Defendant's challenges to the sufficiency of the evidence and **[*18]** hold that the Government presented enough evidence to establish that Defendant participated in the cocaine conspiracy charged in his indictment.

2. Sufficiency of the Evidence Regarding the Existence of a Single Conspiracy

When presented with a challenge to the sufficiency of the evidence, we examine the evidence in the light most favorable to the Government, and determine whether the Government presented enough evidence such that a rational trier of fact could find guilt beyond a reasonable doubt. See *United States v. Leal, 75 F.3d 219, 222 (6th Cir. 1996).* Circumstantial evidence is sufficient to sustain a conviction, and the evidence

need not remove every reasonable hypothesis except that of guilt. See *United States v. Jones, 102 F.3d 804, 807-08 (6th Cir. 1996).* "Whether single or multiple conspiracies have been shown is usually a question of fact to be resolved by the jury." *Kelley, 849 F.2d 999 at 1002.*

Defendant argues that the Government presented evidence showing that there were discrete criminal conspiracies that ended whenever McAndrew, the conspiracy leader, was jailed. Defendant's argument is without merit. The mere fact that a conspiracy is periodically **[*19]** dormant does not disprove that there is an overarching conspiracy. See *United States v. Rodgers, 128 F.3d 446, 473-74 (6th Cir. 1997).* Furthermore, we recognize that a conspiracy can continue despite the fact that one of the co-conspirators has been jailed. See, e.g., *Cohoon v. Rees, 820 F.2d 784, 786 (6th Cir. 1987).*

Additionally, we note that the evidence the Government presented at trial contradicts Defendant's claim that the conspiracy ended whenever McAndrew was sent to jail. The Government offered proof showing that Defendant continued to participate in the cocaine conspiracy during McAndrew's imprisonment. Specifically, the Government presented evidence showing that McAndrew set Defendant up with another person to purchase Defendant's cocaine before he went to jail. Additionally, the Government provided evidence showing that, during McAndrew's imprisonment, (1) Defendant visited McAndrew and discussed drugs, (2)

Defendant secured a loan from McAndrew's father to finance his drug operation, and (3) Defendant provided McAndrew with counsel so that the leader could secure a shorter jail sentence.

We note that the trial judge gave the jury a multiple conspiracy instruction, **[*20]** and the jury determined that there was one conspiracy in operation. We treat the jury's fact finding on this issue with deference. See *Kelley, 849 F.2d at 1002.* Given the substantial evidence the Government presented showing that the conspiracy was ongoing during McAndrew's imprisonment, we hold that the Government presented sufficient evidence to prove that there was a single conspiracy from 1984 to 1995.

3. Proof of Participation

Defendant argues that the Government did not provide enough evidence to show that he was a participant in the conspiracy. Specifically, he argues that the Government only showed that he had a relationship with McAndrew and did not prove that he had a relationship with the other co-conspirators. n2

n2 Specifically, Defendant argues that the Government tried to prove that he was part of a wheel conspiracy, but failed to show that there was a rim to the conspiracy (meaning that he had a connection to all the conspiracy

members). See *United States v. Evans, 970 F.2d 663 (10th Cir. 1992)* (describing the wheel theory of conspiracy).

[*21]

Defendant errs when he argues that the Government was required to prove that he had a relationship with all the conspirators in the cocaine conspiracy. "The unity essential to a conspiracy is derived from the assent of its members to contribute to a common enterprise. The government is only required to show that a co-conspirator adopted the conspiracy's purpose, and it may do so by showing that the parties shared a tacit or mutual understanding." *Phibbs, 999 F.2d at 1063* (internal citations omitted). Indeed, "seemingly independent transactions may be revealed as parts of a single conspiracy by their place in a pattern of regularized activity involving a significant continuity of membership." *Kelley, 849 F.2d at 1003* (citing *United States v. Grassi, 616 F.2d 1295, 1302 (5th Cir. 1980).*

On review of the facts presented at trial, we find that the Government proved that Defendant participated in the conspiracy by showing that he tacitly adopted the conspiracy's goal--helping McAndrew's regional organization sell and distribute cocaine--and that he remained in continuous association with the central co-conspirator, McAndrew. The Government presented sufficient evidence to **[*22]** prove that Defendant tacitly adopted and facilitated the conspiracy's

goal because it showed, among other things, that (1) Defendant served as McAndrew's back-up cocaine supplier, providing cocaine in both Tennessee and Texas; (2) Defendant took drugs on credit from McAndrew; (3) Defendant discussed drug transactions with McAndrew; (4) Defendant accepted a referral for another drug purchaser through McAndrew; (5) Defendant helped McAndrew find an attorney to reduce his sentence; and (6) Defendant secured a loan through McAndrew to finance his part of the drug conspiracy. The evidence that showed Defendant's tacit endorsement of the conspiracy's goals also established Defendant's continued association and regularized business transactions with the cocaine conspiracy leader. These facts were sufficient for the jury to find that Defendant participated in the conspiracy even though he did not have a relationship with all of his fellow co-conspirators. See *United States v. Barrett, 933 F.2d 355, 359 (6th Cir. 1991)* (noting that a defendant is a co-conspirator when he negotiates about drug purchases and sets up suppliers).

4. Proof of Substantial Participation

Defendant argues **[*23]** that the Government's evidence showed that he had a minimal role in the cocaine conspiracy and that this evidence was insufficient to prove that he was a "full-fledged" co-conspirator. See e.g., *United States v. Wright, 12 F.3d 215, 1993 WL 465164, 4** (6th Cir. 1993)

(unpublished) (refusing to convict a defendant as a co-conspirator when the only proof of his knowledge about the alleged drug conspiracy was fact that the smell of marijuana emanating from his house); *United States v. Johansen, 56 F.3d 347, 351 (2d Cir. 1995)* (holding that a defendant who used a "Mob" front-man for small-scale fraudulent credit transaction was not a co-conspirator in the "Mob's" organized credit card scheme); *Evans, 970 F.2d at 673 (10th Cir. 1992)* (holding that a defendant who lent a dealer a scale for weighing crack in exchange for crack was not a co-conspirator).

We find that the Government presented enough evidence to show Defendant was a co-conspirator. Thus far, we have declined to create a single rule to govern what kind of proof establishes that a defendant is a co-conspirator. Our sister circuits, however, have held that a person cannot be convicted as a co-conspirator when **[*24]** the person performs an illegal act for the conspiracy, but is not aware that he has done so to facilitate the conspiracy's goal. See, e.g., *Evans, 970 F.2d at 670.* When the court determines whether a defendant is a co-conspirator, it is appropriate to examine whether the defendant in taking an illegal action "depends on the operation of each link in the [conspiracy] chain to achieve the [conspiracy's] common goal." Id. (internal citations omitted).

The Government introduced evidence at trial showing that Defendant broke the law in order to further the cocaine

conspiracy's goals, and it offered proof that Defendant depended on his co-conspirators when he took action. Specifically, the Government showed that Defendant furthered the conspiracy's goals by serving as the conspiracy's back-up cocaine supplier, providing cocaine contacts in Tennessee and Texas. The Government also proved that Defendant acted interdependently with McAndrew by showing that (1) Defendant accepted drugs on credit from McAndrew, with the expectation that he would split the proceeds with McAndrew, (2) McAndrew referred Defendant to an alternate cocaine buyer to serve his needs while McAndrew was in **[*25]** prison and (3) Defendant relied on McAndrew to get him a loan to finance his drug operation. Given the substantial evidence establishing that Defendant played a key role in the cocaine conspiracy ring, and showing that his financial interest in the conspiracy depended on the conspiracy's goals being realized, we find that Government offered sufficient evidence to prove that Defendant was a co-conspirator.

5. Proof of Continuous Participation

Defendant argues that the Government failed to prove that he stayed in continuous contact with his co-conspirators from 1983 to 1995, the years charged in the indictment, and therefore, it failed to prove that he was a participant in the cocaine conspiracy.

We reject Defendant's claim. An "individual may be held responsible for all of his co-conspirators actions until he withdraws from the conspiracy by taking affirmative action to defeat or disavow the purpose of the conspiracy." *United States v. Lash, 937 F.2d 1077, 1083 (6th Cir. 1991)* (internal citations omitted). A defendant has the burden of proving that he withdrew from a conspiracy because it is an affirmative defense Id. We note that Defendant has not offered any proof **[*26]** that he affirmatively acted to end his association with his co-conspirators.

Even if we accepted Defendant's contention that the Government had to prove that he continuously associated with his co-conspirators between 1983 and 1995, we find that the Government met its burden. The Government introduced evidence showing that (1) in 1984 Defendant accepted drugs from McAndrew on credit and agreed to split the proceeds with him; (2) throughout the 1980's Defendant sold cocaine to a source McAndrew referred; (3) during the 1980's Defendant supplied McAndrew with counsel, discussed drug transactions with him, and used him as a referral for a loan; and (4) during the early 1990's, Defendant functioned as a back-up cocaine supplier for McAndrew. Because the Government presented substantial evidence at trial showing that Defendant had an ongoing role in the McAndrew cocaine conspiracy we find that the Government adequately proved Defendant's charge for conspiracy to distribute cocaine.

6. Constructive Amendment of the Indictment

Defendant alleges that the Government initially indicted him for participating in a cocaine conspiracy and then constructively amended his indictment by presenting **[*27]** proof at trial that he was involved in a cocaine and marijuana conspiracy. The Government argues that the marijuana evidence was admissible because it was "inextricably intertwined" with the Government's evidence of the cocaine conspiracy. We find that the trial court properly admitted the evidence regarding Defendant's marijuana dealing because this evidence was inextricably intertwined with the Government's evidence regarding the cocaine conspiracy.

"In order to obtain a reversal due to a variance between the indictment and the evidence, a two-prong test must be satisfied: (1) the variance itself must be demonstrated and, (2) the variance must affect some substantial right of the defendant." *Kelley, 849 F.2d at 1002.*

The evidence regarding Defendant's marijuana dealing is governed by this Court's jurisprudence on "intrinsic evidence." See *United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1991).* We allow the trial court to admit evidence regarding a defendant's unindicted criminal activity when that activity is "intrinsic" or "inextricably intertwined" with charges named in the indictment. n3 See id. Intrinsic evidence is evidence of wrongs that are "part of [the] **[*28]** single criminal episode" charged in the indictment. Id. A district

court should admit evidence regarding drug transactions for which a defendant has not been indicted when the proof regarding the transactions is "so blended or connected . . . [with the indicted charge] that proof of one incidentally involves the other[] or explains the circumstances or tends to logically prove an element of the crime charged." *United States v. Luna, 94 F.3d 1156, 1162 (6th Cir. 1996).* Additionally, this Court admits evidence regarding a defendant's unindicted drug activities, when the evidence assists in the "telling of the [drug conspiracy] story." *United States v. Burdette II, 106 F.3d 402, 1997 WL 41210 (6th Cir. 1997)* (unpublished decision). Appellate courts in other circuits similarly allow admission of evidence relating to unindicted drug transactions as intrinsic evidence when the other transactions provided the res gestae for the events charged in the defendant's indictment. See, e.g., *United States v. Contreras, 602 F.2d 1237, 1240 (5th Cir. 1979).*

n3 Federal Rule of Evidence 404(b), which governs "other crimes, wrongs or acts" evidence, applies when the Government seeks to admit evidence of wrongs a defendant committed at "at different times and under different circumstances from the offense charged." This kind of evidence is termed "extrinsic" evidence. See *Barnes, 49 F.3d at 1149.* However, Rule 404(b), "does not apply where the [Government's] evidence is 'inextricably intertwined' with evidence of the crime charged in the indictment." Id.

[*29]

We believe that the Government's evidence regarding Defendant's marijuana dealing was intrinsic evidence because it was so blended and connected with the cocaine conspiracy transactions he was indicted for, that the evidence of the two could not be presented separately. See *Luna, 94 F.3d at 1162.* At trial, McAndrew testified that Defendant mainly dealt marijuana, but that Defendant provided him with cocaine when McAndrew could not rely on his main supplier. McAndrew also testified that he had conversations with Defendant in which the two switched back and forth discussing both marijuana and cocaine deals. Given that Defendant and McAndrew's conversations about marijuana often occurred simultaneous to their discussions about cocaine, we find that the marijuana evidence was intrinsic to the cocaine charges Defendant for which Defendant was indicted, and therefore the evidence describing the marijuana transactions was admissible to help prove Defendant's charge for conspiracy to distribute cocaine.

Because Defendant has not demonstrated a variance between the evidence and the indictment, we will not analyze whether the admission of the evidence affected his substantial rights, the **[*30]** second part of the test used to determine whether the Government has constructively amended an indictment. See *Kelley, 849 F.2d at 1002.* Therefore, we hold that the district court did not err when it allowed the

Government to admit evidence regarding Defendant's marijuana transactions as intrinsic evidence.

7. Sufficiency of the Evidence Regarding the Interstate Travel in Furtherance of a Conspiracy Charge

Defendant claims that he had ended his association with his co-conspirators before the traffic stop on July 16, 1992, and therefore the evidence discovered in his car during the stop cannot be used to sustain his charge for interstate travel in furtherance of the cocaine conspiracy. When this court reviews a challenge to the sufficiency of the evidence, we consider "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Avery, 128 F.3d at 971.*

In order to prove that a defendant has traveled interstate in furtherance of a conspiracy, in violation of *18 U.S.C. § 1952*(a), the "Travel Act," the Government must show that the defendant **[*31]** traveled interstate with the intent of carrying on of an unlawful activity and that the defendant committed a subsequent act in furtherance of the conspiracy. See *United States v. Alsobrook, 620 F.2d 139, 141 (6th Cir. 1980).*

We find that the Government showed that Defendant had the intent to further the goals of the cocaine conspiracy and that he took an overt act to that end. Specifically, the Government offered proof that Defendant was caught

traveling on an interstate highway in a car designed to move illegal drugs, and showed that he was carrying a suspiciously large amount of money which he could not attribute to a legitimate source. We have previously found this kind of evidence sufficient to prove a Travel Act charge. See *United States v. Blanco, 844 F.2d 344, 352 (6th Cir. 1988).* We have also recognized that proof that a defendant is traveling with a large amount of concealed money can be offered to establish that the defendant took overt action in furtherance of a drug conspiracy, or to establish unexplained enrichment after the commission of a crime. See *United States v. Okayfor, 996 F.2d 116, 117 (6th Cir. 1993).*

Defendant argues that at his sentencing hearing **[*32]** the district court determined that the sole witness testifying as to Defendant's association with the conspiracy in 1992 was not credible, and therefore the court determined that the Government did not prove Defendant associated with the conspiracy during this period. Defendant's argument is in error. Although the district court may have rejected the testimony establishing that Defendant associated with his co-conspirators in 1992, the jury determined that this testimony was credible enough to find Defendant guilty of the Travel Act charge. A jury's assessment of a witness's credibility is not reviewable by this court. See *United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988).* We reiterate the standard used to determine whether a defendant has associated with his co-conspirators. In order for a defendant to show that he was

not involved in a conspiracy at a given point, he must show that he took affirmative steps to end his association with his co-conspirators. See *Lash, 937 F.2d at 1083.* Defendant has failed to offer any proof to establish this affirmative defense. See id.

C. Challenges to the Admission of Evidence

1. Drug Forfeiture Evidence

On appeal, **[*33]** Defendant argues that the district court should have granted his motion for mistrial when the Government elicited testimony about the drug forfeiture settlement because the Government acted in violation of the court's order barring this evidence. The Government argues that it did not violate the court's order because it did not disclose that Defendant voluntarily entered the settlement rather than contest the forfeiture, a fact that would have suggested his guilt. We find that the Government did violate the district court order, however, we hold that the district court properly denied Defendant's motion for mistrial because admission of the evidence was harmless error.

This Court reviews the district court's decision regarding the admission of evidence for abuse of discretion *Robinson v. Runyon, 149 F.3d 507, 512 (6th Cir. 1998).* An abuse of discretion exists only when the reviewing court is firmly convinced that a mistake has been made. See id. "Only if the

erroneously admitted evidence is of an exceptionally prejudicial character, such that its withdrawal from consideration by the jury cannot be expected to remove the harm, will it be appropriate to grant a new trial." **[*34]** *United States v. Carr, 5 F.3d 986, 993 (6th Cir. 1993)* (citing *United States v. Wells, 431 F.2d 432, 432 (6th Cir. 1970)).* "We look to the entire record to see if an the [alleged error] tended to prejudice the defendant." See *United States v. Wiedyk, 71 F.3d 602, 607 (6th Cir. 1995)*(discussing Fed. R. Crim. P. 52(a)). We have recognized that when "evidence is erroneously admitted, the subsequent striking of the evidence along with clear instructions to the jury to disregard it, ordinarily will cure the error." *Carr, 5 F.3d at 993.*

Our review of the record shows that the district court properly determined that the evidence regarding the forfeiture settlement was inadmissible under Federal Rule of Evidence 408. Rule 408 provides that

Evidence of . . .accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible, This rule does not require the exclusion of any evidence otherwise **[*35]** discoverable merely because it is presented in the course of compromise negotiations. . . . . or require exclusion when the evidence is offered for another purpose,

such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Fed. R. Evid. 408.

We reject the Government's assertion that it complied with the district court's order barring the forfeiture evidence because it did not inform the jury that Defendant did not contest the forfeiture. Defendant's motion to the court was clearly phrased to suggest that any mention of Defendant's involvement in negotiating a drug forfeiture settlement would be inadmissible under Rule 408 because it would have revealed to the jury that the State of Louisiana believed Defendant used his property to violate state drug law. When the trial judge granted Defendant's motion in toto, the Government had adequate notice that the judge's order barred them from mentioning the fact that the forfeiture negotiations had occurred.

We hold, however, that the trial court properly determined that admission of the evidence was harmless. An error that is not **[*36]** of constitutional dimension is harmless "unless it is more probable than not that the error materially affected the verdict." *United States v. Fountain, 2 F.3d 656, 668 (6th Cir. 1993).* The trial court correctly determined that this evidence would not affect the jury's deliberations about Defendant's charges. Defendant was on trial for conspiracy to distribute cocaine, in violation of *21 U.S.C. § 846,* and interstate travel in furtherance of a cocaine conspiracy, in violation of *18 U.S.C. § 1952* (1994). As explained previously, the

Government offered overwhelming proof showing that Defendant was guilty of the conspiracy charge. Specifically, the Government provided evidence showing that Defendant had an agreement with the conspiracy leader by offering proof that Defendant discussed drug transactions with the cocaine leader, and that he provided the cocaine leader with drug sources in Texas and Tennessee. The Government offered proof showing that Defendant knew and intended to join the conspiracy by showing that Defendant accepted drugs on credit from the leader, accepted referrals for a drug purchaser from the leader, and allowed the leader to secure a loan for him to run his **[*37]** drug operation. The district court properly concluded that, given the extensive evidence indicating that Defendant had participated in the conspiracy, the forfeiture evidence would not materially affect the jury's decision to find Defendant guilty on this charge.

The district court similarly concluded that the forfeiture evidence would not affect the jury's determination that Defendant traveled interstate in furtherance of the cocaine conspiracy. As described above, the Government provided evidence showing that Defendant was traveling in a car designed to transport cocaine, that he had $122,000 on his person when he was stopped by police, and that he could not explain from where this money had come. We have held that such evidence is sufficient to support a conviction for interstate travel in furtherance of a drug conspiracy. See *Blanco, 844 F.2d at 352.* Therefore, the district court properly

concluded that the evidence of the drug forfeiture settlement would not substantially affect the jury's determination that Defendant was guilty of traveling interstate in furtherance of the drug conspiracy.

We note that the trial court issued a curative instruction to the jury, reminding **[*38]** them that the forfeiture testimony should not be used to determine Defendant's guilt. This instruction cured whatever prejudice resulted from the forfeiture testimony. Based on these findings, we hold that the district court properly concluded that the admission of the forfeiture evidence did not substantially prejudice Defendant's case.

2. Dog Alert Evidence

Lastly, Defendant argues that the district court violated Federal Rule of Evidence 401 when it admitted evidence that a narcotics dog alerted on his car. Defendant argues that this court has seriously questioned whether dog alert evidence has probative value, given our recognition that a vast amount of American money is tainted with illegal drugs. See United States v. $23,000.00 in *United States Currency, 54 F.3d 777, 1995 WL 296347,* *1 (6th Cir. 1995). The Government admitted the evidence in order to explain that the narcotics dog's alert triggered the police to search Defendant's car and it helped explain why the officers impounded Defendant's vehicle and the money found inside. The trial court admitted

the evidence without specifically explaining its justification. We believe that the district court's analysis **[*39]** admitting the evidence was deficient, however, we find that the dog alert evidence was admissible under Rule 401 because it was not used to establish facts showing Defendant's guilt for his charges.

Federal Rule of Evidence 401 allows the admission of "all relevant evidence, meaning, all evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In civil forfeiture cases, this Court has questioned whether dog alert evidence has enough probative value to be used in building probable cause for a search, noting that large amounts of American currency have been tainted with illegal narcotics. See, e.g., United States v. $53,082.00 in *United States Currency, 985 F.2d 245, 250 n.5 (6th Cir.1993).*

At trial, the district court failed to conduct a proper inquiry under Rule 401 to determine whether the evidence should be admitted. The trial judge asked the attorneys from each side to read excerpts from the relevant case law during a bench conference and then issued his ruling. The judge stated,

Dangerous. I'm going to let you put the dog man on, the **[*40]** dog alerting on the drug. I don't think the Sixth Circuit's just thrown that to the wind. I think it still has some probative value, although its not--It doesn't alone justify the

government's taking somebody's money away from them. I agree with that.

The trial judge's statements show that he admitted the evidence without determining its probative value. A proper review of the case law would have indicated that dog alert evidence, standing alone, is not probative enough to establish probable cause for a search. See 23,000.00, *1995 WL 296347*, at *2. However, when this evidence is coupled with other factors, it can be used to build probable cause. Id. Although the law in this area is still developing, we note that all of the cases have recognized that dog alert evidence does have some minimal probative value. Therefore we conclude that, in this case, the district court did not abuse its discretion when it admitted the dog alert evidence particularly because the evidence was not used to prove facts establishing defendant's guilt for the drug charges. Indeed, the evidence was only admitted to flesh out the circumstances of Defendant's arrest. We note that if the evidence was **[*41]** excluded the jury would have had substantial doubts about whether the officers who stopped Defendant's vehicle had proper reason to search and impound Defendant's car, and confiscate the money found inside. Therefore, we conclude that the district court could have properly admitted the evidence under Rule 401.n4

n4 We note that dog alert evidence may in some cases pose an undue risk of prejudice to a defendant's case; however. Defendant does not challenge the dog alert evidence under Rule 403. Even in these circumstances, a

proper instruction limiting the use of this evidence could remedy any prejudice.

III. CONCLUSION

For the aforementioned reasons, we AFFIRM the district court order entering Defendant's convictions and sentences.

DISSENTBY: JOHN R. GIBSON

DISSENT: JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. After we heard argument in this case, the United States Supreme Court decided *Knowles v. Iowa, 142 L. Ed. 2d 492, U.S. , 119 S. Ct. 484 (1998).* Knowles was stopped **[*42]** for driving forty-three miles per hour in a twenty-five mile per hour zone, and the police officer stopped him and issued a citation rather than arresting him. *119 S. Ct. at 486.* The officer then searched the car and found marijuana. Id. A unanimous Supreme Court held that a full-blown search of the automobile and driver, after the officer had elected to issue a traffic citation rather than arrest the driver, violated the Fourth Amendment. Id. Notwithstanding state law permitting the officer to arrest Knowles and to search the car whether he arrested Knowles or gave him a citation, Chief Justice Rehnquist held that neither the officer's safety not the need to preserve evidence was implicated by the

routine traffic stop. Id. at 487-88. Once Knowles was stopped for speeding and was issued a citation, all of the evidence necessary to prosecute him had been obtained. Id. at 488. Without more, the stop of the vehicle and the issuance of a traffic citation did not justify a full search of the car.

Knowles, of course, did not disturb the well-settled rule that "pretextual" vehicle stops do not violate the Fourth Amendment. In other words, an officer may pull over a driver **[*43]** for speeding, failing to use a turn signal, or following other vehicles too closely even if the officer's "true" motivation is to search for contraband and even if the officer initially lacks the requisite "reasonable suspicion" to do so. *Whren v. United States, 517 U.S. 806, 812-13, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996)* (legality of traffic stop not dependent upon officer's motivations); *United States v. Bradshaw, 102 F.3d 204, 210 and n.12 (6th Cir. 1996)*, cert. denied, *520 U.S. 1178, 117 S. Ct. 1453, 137 L. Ed. 2d 558 (1997)*. Nevertheless, to pull over a vehicle and to conduct a full-blown search are two very different things. Once the initial purpose of a stop has been fulfilled, the greater intrusion of searching the car--or of detaining a suspect so that further evidence may be gathered to justify a search--must be premised upon something more than the traffic violation that warranted the initial stop. See *Knowles, 119 S. Ct. at 487-88* (absent actual arrest, fact of traffic violation and issuance of citation did not justify car search); *United States v. Erwin, 155 F.3d 818, 822 (6th Cir. 1998)* (en banc) ("After the

deputies satisfied themselves **[*44]** that Erwin was not drunk or otherwise impaired, they were justified in continuing to detain Erwin if, by then, they had reasonable and articulable suspicion that Erwin was engaged in other criminal activity.") (emphases supplied), petition for cert. filed, *67 U.S.L.W. 3409* (U.S. Dec. 16, 1998) (No. 98-984); *United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995).* As the court correctly observes, a detention of Potts or his vehicle. beyond the point at which his traffic violations were resolved, required at least "reasonable suspicion" that Potts had taken part in further criminal activity or that his car contained evidence to that effect. See Ante at [8]; *Mesa, 62 F.3d at 162.*

I entertain serious concern that the officers in Sulphur, Louisiana, engaged in conduct quite similar to that of the officers in Knowles Officer Brent Chamblee testified that he was working in the criminal patrol unit on the day in question and that "our primary purpose was to stop vehicles and take an ordinary traffic stop a little further to see if there was any type of criminal activity." His partner, Officer Scott Thompson, likewise testified that "we're trained to go a little **[*45]** bit further investigating into a traffic stop, in search of criminal activity or criminals." The officers observed Potts changing from the left lane to the center lane without using a traffic signal, and they clocked him on radar at sixty-eight miles per hour in a fifty-five mile per hour zone. Chamblee activated the emergency light, and Potts pulled over to the

right shoulder. Chamblee approached Potts and asked him to step out of the vehicle, which he did. Potts was asked for his driver's license, and he produced a Tennessee license identifying him as Daniel Potts. Chamblee advised Potts that he was stopped because of traffic violations, and then began to question him about his travels. Potts told him that he was going to Houston to do some land, oil, and gas work. When asked for a business card, he became nervous and stated that he did not have one. Potts explained to Chamblee that he worked with some people in Tennessee and that his associates wanted Potts to acquire a business partner in Houston. When asked by Chamblee, Potts stated that he had stayed in Chattanooga the night before. Chamblee asked for a vehicle registration, which Potts produced and which showed that the vehicle **[*46]** belonged to Potts. He was asked if he was carrying anything illegal and said no, but refused to allow a search of the vehicle.

Chamblee then went back to the car radio, contacted the dispatcher, had a criminal history run, and contacted a canine unit to meet him at the scene. The canine unit soon arrived, and the drug dog "alerted" next to Potts's car. Chamblee and Thompson then searched the car, found marijuana and a large amount of currency in the trunk, and arrested Potts.

On cross-examination, Chamblee admitted that if he were focusing solely upon traffic violations, he might or might not run a criminal history check. That would depend, he

explained, on the circumstances surrounding the stop of the vehicle and his contact with the violator.

In light of the facts recited above, I respectfully disagree with the court's conclusion that a "reasonable articulable suspicion" of criminal activity justified the further detention of Potts after the officers finished dealing with Potts's traffic violations. Chamblee testified that Potts "answered his questions evasively, appeared nervous, and appeared to be making up his answers to questions." Ante at [9]. Although reasonable suspicion **[*47]** could not arise from any one of these circumstances, the court explains, "Collectively, they suffice." Id. I share the court's view that no single aspect of Pott's behavior could create a reasonable suspicion of criminal activity, see *Mesa, 62 F.3d at 162* (nervousness alone insufficient); *United States v. Avery, 137 F.3d 343, 350 (6th Cir. 1997)* (lying to police about origin and purpose of trip is not by itself incriminating), but my objection to the court's holding is threefold. First, the conversation was not sufficient to support a finding that Potts's answers were evasive. Potts told the officer where he had stayed the previous night (Chattanooga), his destination (Houston), the purpose of his trip (to find another business partner), whom he worked with (some partners in Tennessee), and that he was carrying nothing illegal. n1 Second, the court provides no evidentiary basis to explain Chamblee's belief that Potts was making up the answers to his questions, and I can see no basis (other than the officer's mere hunch) to support this belief. The lack of a

business card and nervousness because of that can hardly support the court's findings. Finally, I cannot accept the **[*48]** bald conclusion that the totality of Potts's innocent behavior somehow justified the detention and search. Nervousness and slightly imprecise responses to police queries are surely the rule, not the exception, in citizen behavior during traffic stops. In short, the evidence relied upon by the court cannot support the challenged detention and search.

n1 In fact, Chamblee quibbled with only one of Pott's answers:

A: So I asked Mr. Potts how long he'd be in Houston, [and] he told me he'd be there about ten days. I asked where in Houston he was going to work. At that point he told me that he had some people back in Tennessee that he was working for and they were wanting to take on a partner down there.

Q: Did you understand his response to your question to answer your question?

A: No. sir, not that one. He really didn't answer that one sufficiently.

J.A. II at 328-29. Moreover, on cross-examination, Chamblee stated, "I believe I asked him who he was going to work for." *Id. at 346-47*--a question adequately addressed by Potts's answer that he worked for people in Tennessee who wished to add a Houston partner to the business. Potts explained the business purpose of his trip

to Houston even though he did not identify his exact workplace. Perhaps the response did not fully address the officer's question, but neither it nor Pott's other answers were "evasive."

[*49]

In my view, the officers in Sulphur, Louisiana, engaged in conduct that has an odor similar to the conduct condemned in Knowles. In Knowles a routine speeding stop resulted in a full car search as a result of a state statute authorizing the search where a traffic citation is issued in lieu of a custodial arrest. *119 S. Ct. at 486-87.* In this case, the search resulted from a policy that on routine traffic stops, police officers were to take the stop a little further to see if there was any type of criminal activity. I would remand for further consideration of the ruling denying the motion to suppress in light of Knowles.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	FILED 12/ 31/96
	)	
v.	)	No. 3:94-cr-163
	)	(JARVIS/MURRIAN)
DANIEL POTTS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

All pretrial motions in this case lave been referred to the undersigned pursuant to 28 U.S.C. §636(b) and the Rules of this Court. A suppression hearing vas held in this case on September 30,1 996, in connectiɑn with the motion of defendant Daniel F. Potts to suppress evidence [Doc. 230]. Post-hearing briefs have been filed and arguments on the motion were heard on December 17 1996 [Docs. 246, 257, 268, 270].

Defendant contends that on July 5, 1992. his automobile was subjected to a warrantless searcl and seizure by officers

of the Sulphur, Louisiana Police Department; that it is the government's burden to show that the initial stop was supported by probable cause; that even if the government is able to establish that the initial stop was supported by probable cause, the defendant was subjected to an unreasonable detention in violation of his Fourth Amendment rights when the officers unreasonably exceeded the scope of the initial stop by questioning him and detaining him for reasons unrelated to the alleged traffic violation; that the officers further violated defendant's right to be free from unreasonable search and seizure by holding him for a significant period of time while a K-9 unit was summoned even though the officers did not have reasonable suspicion to detain Mr. Potts; that the officers ultimately based their search of the automobile upon the purported indication of a drug dog and the burden is on the government to establish the reliability of that dog; and that continuation of the search of his car the next day violated his Fourth Amendment rights.

The government concedes that the defendant has standing to object to the search in this matter since he was the registered owner and sole occupant of the vehicle searched. The government's position is that the defendant was stopped for speeding and for an improper lane change; that the validity of the traffic stop is beyond question; that the period of detention of the defendant while the drug dog was summoned and ultimately alerted on the car was a very short period of time and was reasonable under the circumstances; that under

all the facts and circumstances probable cause was established to conduct a warrantless search of the vehicle.

Officer Brent Chamblee is a trooper with the Louisiana State Police. Before becoming a state trooper he was an officer with the Sulphur, Louisiana Police Department for some eight years. He testified that on July 15, 1992, he was operating with a patrol unit of the Sulfur Police Department on I-10 within the city limits of Sulphur, Louisiana. This patrol unit was patrolling the approximate four to five miles of interstate within the city limits of Sulphur, conducting an interdiction effort. The purpose of the patrol unit was to effect ordinary stops for traffic violations and to take them "a little further." Tr. 10.[1] This unit was designated as the Criminal Patrol Unit. He and Officer Scott Thompson were patrolling in an unmarked green Ford Mustang vehicle on I-10 west bound. They were in the right lane and noticed a silver Mercedes in the far left lane pass their car. They moved to the left lane and clocked[2] it on radar at 68 miles per hour in a 55 mile an hour zone. They also observed the Mercedes change lanes without giving a turn signal which is also a

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[1]References to the transcript of proceedings on September 30, 1996, are denoted as "Tr. _____."

[2]Officer Chamblee described it as a "pace clock." That means that the officers accelerated to the same speed as defendant's car and the radar indicated that the officers' car was traveling 68 m.p.h. Tr. 11-12.

violation of Louisiana law according to the testimony. Tr. 142. The officers activated their emergency lights and the vehicle stopped promptly. The time was 5:09 P.M.

Officer Chamblee testified that the radar unit was working properly; that although he had not been trained to use it, it was explained to him that it calibrated itself automatically; and that the machine was capable of calibrating itself each time it was activated. He testified that it was in proper working order on July 15. Tr. 13-14.

Once the stop was made, Officer Chamblee approached the driver of the Mercedes, who was later identified as defendant Daniel Potts. Officer Thompson approached the Mercedes from the passenger side and made a quick check for any possible weapons. Officer Chamblee asked the defendant to step out and to show his driver's license and they walked to the rear of the Mercedes. The defendant exhibited a Tennessee driver's license in his name. Officer Chamblee advised him of the traffic violations and the defendant answered, "Yes, sir." Tr. 15. Officer Chamblee asked Mr. Potts where he was heading and Potts replied that he was traveling to Houston. Officer Chamblee asked defendant what was his purpose of traveling to Houston and the defendant replied that he was going to Houston to do land, oil and gas work. Officer Chamblee then asked him how long he would be in Houston and Potts replied, "about ten days." Officer Chamblee asked him if he had any business cards and the defendant said, "uh, no sir." Officer Chamblee testified

at the suppression hearing that from this point on the defendant became "a little nervous." Tr. 15, 32-33. This was based on the officer's assessment of the defendant's voice inflection and body language. Officer Chamblee's official reports of the incident do not mention any nervousness on defendant's part but do mention that several answers were preceded by an "uh" after the officer asked about a business card. Defendant's Exhibit 1 and 2. Officer Chamblee asked him where the defendant was to work in Houston and Chamblee said he answered that he had some people back in Tennessee that he was working for and they were wanting to take on a partner down there. Tr. 15. This answer was not responsive to the question asked. Officer Chamblee asked defendant where he had come from and the defendant replied that he had stayed in Chattanooga, Tennessee, the night before. Officer Chamblee checked the registration of the vehicle and it revealed that the defendant was the registered owner of the Mercedes. Officer Chamblee asked the defendant if there was anything illegal in the vehicle and the defendant said "no." Officer Chamblee then asked the defendant if the officers could have permission to search the vehicle and the defendant refused. At that point, Officer Chamblee called on the radio for the defendant's criminal history[3] and for the K-9 unit which was working with the

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[3]Officer Chamblee testified that calling for the motorist's criminal history was a routine part of "these types

Criminal Patrol Unit. Officer Chamblee testified that there was only four to five minutes between the time the car was stopped and when the K-9 dog and a criminal history were requested; that within four to five minutes after the request, the K-9 unit showed up; that the criminal history came back just before the K-9 unit arrived and showed that the defendant had been arrested in 1975 for possession of marijuana and Peyote in Arizona.

Captain Kenneth Moss was the dog handler. He took the dog around the Mercedes in a clockwise fashion at first and the dog did not alert. He then worked counter-clockwise with the dog pointing at places for the dog to sniff and the dog alerted at or near the driver's side door handle and the right rear portion of the trunk. At that point, the officers told defendant they were going to proceed to search the vehicle.

There is a dispute about how long the defendant was detained on the roadside before probable cause developed to search his car. Captain Moss signed a K-9 report stating that he and the dog did not arrive on the scene until 1807 hours or 6:07 p.m. Defendant's exhibit 5. Defendant's exhibit 4 is another version of that K-9 report which states that the dog and Captain Moss arrived at 1720 hours or 5:20 p.m. The length of time of the detention is a very important fact in this case. Unfortunately, Captain Moss was not available to testify since he is seriously ill. Captain Keith Andrus, a

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of stops." Tr. 16.

supervisory police officer who was involved in the stop, testified that the K-9 report signed by Captain Ken Moss (defendant's Exhibit 5) was a report that had been sent to the United States Attorney in Knoxville after it was removed from the original case file, but that the actual information that went to the police computer network in 1992 was that contained on defendant's exhibit 4. He said that Captain Moss had kept the version set forth in defendant's exhibit 5 on the hard drive of his personal computer but that when the information was typed into the police network in 1992 the corrected version went in as defendant's exhibit 4. Tr. 140-141. He testified that defendant's exhibit 4 had been prepared after Captain Moss had had an opportunity to check the records and that Captain Moss was not being precise with times when he completed the K-9 report which is defendant's exhibit 5.

It is noted that in defendant's exhibit 1, which is the handwritten report signed by Officer Chamblee, he states that the time of the occurrence was 1800 hours. It is unclear from the record what is meant by the "occurrence." Officer Chamblee testified on redirect examination that the call that went out for the K-9 unit and the criminal history on the defendant was made at the same time and that according to government exhibit 12, the criminal history was received at

5:16 p.m.[4] He testified that four minutes after the criminal history information was radioed to the officers, the K-9 unit arrived. He testified that it definitely was not 6:07 p.m. when the K-9 unit arrived.

The undersigned finds that the sequence of events occurred as follows:

1. 5:09 P.M., defendant's car is stopped by Officers Chamblee and Thompson. Officers Craddock and Andrus arrived shortly thereafter;
2. 5:13 P.M. - 5:14 P.M., Officer Chamblee calls for criminal history check on defendant and calls for the K-9 unit, Tr. 17;
3. 5:17 P.M. - 5:19 P.M., criminal history and K-9 unit arrive on scene at approximately the same time, Tr. 18, 63, 81, 95-96, 99, 107;
4. 5:20 P.M. - 5:23 P.M., K-9 unit alerted on defendant's car, Tr. 20, 91.

Despite the fact that the dispatcher's logs have been destroyed, despite the fact that defendant's exhibit 1 lists the "occurrence" at 1800 (6:00 P.M.), and despite the fact that Captain Moss' signing K-9 report states that he and the dog arrived at the scene at 1807 hours (6:07 P.M.), the

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[4]Presumably, this printout (Government exhibit 12) was received at police headquarters at 5:16 p.m. and the information was then promptly transmitted by radio to Officer Chamblee.

preponderance of the evidence shows that the sequence of events occurred as set out just above. First of all, the witnesses who testified at the suppression hearing all supported this rapid chain of events. Defendant could have testified and contradicted their version of the timing of the sequence of events. See Rule 104(d), Fed. R. Evid.; United States v. Simmonds, 390 U.S. 377, 394, 88 S.Ct. 967, 976 (1968) (When a defendant testifies in support of a motion to suppress, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection); but see Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971) (Inconsistent statements by the defendant violative of the Miranda rule were used to impeach at trial). This was a small stretch of interstate which was being patrolled and the drug interdiction unit was activated. It is reasonable to believe that Captain Moss and the drug dog would be close by. The jail records indicate that Mr. Potts was booked at 6:30 P.M. Government exhibit 11. There was testimony that he could not have been booked at that time if the drug dog had not arrived at the scene until after 6:00 P.M. Tr. 113. The criminal history report was printed out at 5:16 P.M. and the evidence revealed that notice of it by radio arrived at the scene of the stop about the same time as Captain Moss and the drug dog. Finally, Officer Billy Craddock, a dog handler and a police officer with the Sulfur Police Department, testified that Captain Moss' signed report (defendant's exhibit 5) shows on its face that it was prepared

at "1800 Hrs." Tr. 112. This supports the testimony that the "1807 Hrs" entry in the body of the K-9 report is simply incorrect.

Upon searching the vehicle the officers found $2,000 in $50 bills in a yellow envelope on the passenger seat. When they searched the trunk they found a plastic ziplock bag containing a small amount of green plant material believed to be marijuana. They also found $121,623.00 in U.S. currency in various locations in the trunk of the car. The dog alerted on the currency. The defendant was arrested for possession of marijuana and illegal use of U.S. currency. He was later charged with these two charges and the two traffic violations, speeding and illegal lane change.

The search of the car was continued the following day. It had been raining on the night of the stop and the officers postponed a complete search until the following day. Upon carefully searching the vehicle they found what they believed to be hidden compartments behind the rear seat of the car. A hole had been cut out on both sides behind the rear seat and the rubber foam from each corner of the backing had been removed creating an empty area on each side 7 ½ inches by 7 ½ inches.

Officer Scott Thompson was the officer who was riding with Officer Chamblee when the stop was made. He appeared and testified at the suppression hearing. He said that when they saw the gray Mercedes it was proceeding at a high rate of speed and that it was clocked on radar at 68 mph in a

55 mph zone. He also said that he observed the illegal lane change. Officer Thompson corroborated the testimony of Officer Chamblee concerning the conversation between the defendant and Officer Chamblee. He also said that when the defendant was asked for a business card he became nervous and stated that he had none; that he would not answer the question where he was going to work in Houston; that he said he wanted to speak to several people in Houston on behalf of some partners in Tennessee; and that he appeared nervous. Officer Thompson was the officer who searched the trunk of the vehicle. He testified that the time between the stop at 5:09 p.m. and the arrival of the K-9 unit was about 10 to 11 minutes; that the dog took two to three minutes to alert on the vehicle and that thereafter the officers searched the vehicle. He said that the defendant's demeanor changed totally after Officer Chamblee asked him for a business card and that the defendant was nervous when asked if he was carrying anything illegal. He said that the defendant would not make eye contact with Officer Chamblee and his answers became very short.

Officer Thompson testified that defendant was not free to leave after he was advised of the traffic violations, but that he was free to leave after the dog alerted on the car. He testified that the vehicle was going to be detained, however.

Officer Billy Craddock of the Sulphur Police Department appeared and testified at the suppression hearing. He stated that he had been on the force for 11 ½ years and that he is a

K-9 handler. He has had a 60 hour handler's course which he went through in 1992. He is familiar with the K-9 that was involved in this search. That K-9's name is Billy who has been active with the police force since February, 1990. Officer Craddock testified that as a regular routine the Sulphur Police Department conducts dog training on Friday unless the handler has a court appearance or it is a holiday; that they spend eight hours training the dog in tracking and alerting to the presence of drugs on these occasions. He said that Billy has "one of the best noses I've ever been associated with." Tr. 104; that out of thousands of training exercises, Billy had only falsely alerted on five or less occasions and that Billy was certified in Austin, Texas, after 416 hours of training. Tr. 110, 132.

Officer Craddock arrived shortly after Officers Chamblee and Thompson had made the stop. He testified that the criminal history came back on the radio just a minute or two before the K-9 unit got there. According to government's exhibit 12 he criminal history was printed out in on the Sulphur Police Department computer at 5:16 P.M. Officer Craddock testified that after the currency was seized it was placed in a locker at the police department and Billy was led into the room. B illy found the currency and alerted on it. Officer Craddock testified that Captain Moss could not have arrived at 6:07 P.M. because the booking records indicated that the defendant had completed the booking process at 6:30 P.M. Tr. 113. It would be impossible for the booking to have

been completed at 6:30 P.M. if the officer had arrived with the dog at 6:07 P.M. The booking record is filled out after a person is brought in, strip-searched, printed and photographed. Tr. 113. Billy is trained to alert on marijuana, cocaine, methamphetamine and heroin. Officer Craddock said that he had been involved in about 98 percent of Billy's drug work since 1990. He said that he supervises dog training and that Billy had a better nose than his own dog. Captain Moss is a trained canine handler who had worked with "Billy" about a year before the stop in question. Tr. 123.

The final witness to testify at the suppression hearing was Captain Keith Andrus who was the senior police officer present at the stop in July of 1992. He was in charge of the criminal patrol unit on the date in question. He said that on that date they had four teams patrolling an approximate four to five mile stretch within the city limits of Sulphur, Louisiana. He said that Officer Craddock was riding with him and that as soon as they heard about the stop they pulled up behind the stopped vehicle and Officers Chamblee and Thompson's vehicle. He said that Officer Chamblee told him that they had run the criminal history and found out that the defendant had been arrested in 1975 in Arizona for possession of Peyote and marijuana and that the K-9 unit had been called. Captain Andrus testified that the K-9 unit arrived a "couple of minutes" after he arrived. Captain Andrus corroborated the details of the dog's alerting on the car and the search that had been given by the other officers. Captain Andrus took

photographs of the marijuana and seized currency once the car had been impounded.

Captain Andrus testified that from the time they heard on the radio of the stop and their arrival at the scene was less than five minutes; that less than 10 minutes after they arrived Captain Moss and the K-9 arrived, and that three to five minutes later the dog had alerted on the car.

On cross-examination Captain Andrus testified that the defendant was charged with speeding, a lane usage violation, illegal use of currency and possession of marijuana. The illegal use of currency charged is a misdemeanor under Louisiana law but carries a one to ten year sentence. Captain Andrus testified that a civil forfeiture action was filed in state court in Sulphur on the day following Potts' arrest. That civil forfeiture action was resolved when Potts paid $109,000 of the $121,623.00 which had been seized to settle the civil forfeiture claim and to have all criminal charges against him dismissed. Andrus testified on cross-examination that, since 1989, the City of Sulphur has seized some $5,000,000 in currency from that four to five mile stretch of I-10 as a result of its interdiction efforts and that 60 percent goes to the police department, 20 percent goes to the district attorney's office and 20 percent goes to the criminal court fund except for a $250.00 payment to the clerk of the court. It was pointed out on cross-examination that the notice of pending forfeiture which is defendant's exhibit 6 states on page 3 that the K-9 detected a narcotic odor behind the driver's side door on the

back seat window and also detected a narcotic odor coming from the middle and right side of the trunk. Captain Andrus said that although he signed the notice of pending forfeiture it was drawn up by the district attorney's office.

Captain Andrus said that he spoke with the defendant at the scene of the arrest and defendant claimed the money which was found in the car; that he said he was self-employed; that he had brought the money with him to buy drilling equipment in Houston; that he refused to give any telephone numbers of his alleged business associates; and said that the reason was that he did not want to get them into trouble.

Captain Andrus also said that he and Officer Craddock, Captain Moss and the drug dog Billy arrived at the scene of the stop within minutes of one another. Tr. 151.

In his post-hearing brief, defendant contends that suppression of the evidence seized is called for on the following grounds:

1. The government failed to sustain its burden of proving probable cause for the initial stop;

2. the officers exceeded the scope of their authority to make a traffic stop and unreasonably detained Mr. Potts without reasonable suspicion;

3. the government failed to sustain its burden of showing probable cause for the search of Mr. Potts' automobile because the government failed to prove that the canine was

sufficiently trained and reliable to justify a finding of probable cause;

4. the officers violated Mr. Potts' Fourth Amendment rights by performing a second warrantless search of Mr. Potts' vehicle late the following day, despite the fact that the officers had ample opportunity to obtain a warrant and no exigency was present that could justify an exception to the warrant requirement.

I. Probable Cause

The government did not fail to sustain its burden of proving probable cause for the initial stop. Speeding and making a lane change without signaling violated Louisiana law. Tr. 142; Government exhibit 11. The testimony of officers Chamblee and Thompson was credible that they pace-clocked defendant's vehicle being operated at 68 miles per hour in a 55 mile per hour zone and they saw him change lanes without signaling. Tr. 11, 74-75. The reliability of the self-calibrating radar equipment was established sufficiently. Officer Thompson also testified that he observed defendant's automobile "traveling at a high rate of speed" in the left lane before the stop. Tr. 74-75. Even assuming the reliability of the radar equipment had not been established, both officers observed the lane change violation and Officer Thompson observed the defendant's vehicle being operated "at a high rate of speed." Defendant could have testified and disputed the government's proof but did not. At the scene of the stop,

defendant responded with "yes, sir" when told why he had been stopped. Tr. 15.

The establishment of probable cause only requires a probability or substantial change of criminal activity. Illinois v. Gates, 462 U.S. 213, 244 n. 13, 103 S.Ct. 2317, 2335 n.13 (1983). The existence of probable cause is determined by examining the totality of the circumstances. Id. As "long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resultant stop is not unlawful and does not violate the Fourth Amendment." United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc).

> Indeed, the U.S. Supreme Court has recently gone even farther in Whren v. United States, _____ U.S. _____, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), in which it held that when a police officer makes a routine traffic stop, it does not matter what the officer's motive was, or whether an objective by reasonable officer would have acted differently, so long as the officer had probable cause to believe that a traffic violation had occurred. 116 S.Ct. at 1774-1775.

United States v. Bradshaw, ____ F.3d ____ n.12, No. 94-6487 (6th Cir., decided and filed December 6, 1996), slip op. at 11 n.12.

The stop did not violate the defendant's Fourth Amendment rights.

II. The Officers' Alleged Conduct as Being Beyond the Scope of Their Authority and the Alleged Unreasonable Detention

It is clear from the officers' testimony that their purpose in operating the interdiction effort was to take routine traffic stops "a little further." As indicated above, it is irrelevant what their true motive was for the stop as long as there was probable cause to believe that a traffic violation had occurred. And so, the questions become what was the scope of their authority after the stop and what were the limits of their detention of defendant after the stop?

A Fergus on stop is a legitimate detention that does not rise to the level of an arrest. United States v. Bradshaw, ____ F.3d at ____ n.13. Such a stop is analogous to a "Terry stop." Id.; see Terry v. Ohio, 392 U.S. 1, ____ S.Ct. ____ (1968).

Once the purposes of the initial traffic stop are completed, normally a motorist cannot be lawfully detained thereafter. United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995). Further detention is only justified if something occurs during the traffic stop which generates reasonable suspicion to justify further detention. Id.

In the instant case, events occurred very rapidly. Approximately 15 minutes expired between the stop and Billy's alerting on defendant's vehicle.

> Mesa does not require that reasonable suspicion be present "up front" for an officer to detain a motorist in his squad car while conducting a records search that is related to the traffic violation for which the motorist was stopped.

United States v. Bradshaw, ____ F.3d at _____ n.18.

In the instant case, a records search related to the traffic violations was not done at the scene of the stop. Officer Chamblee called for the drug dog and a criminal history check on defendant within five minutes of the stop. It would have been a violation of defendant's Fourth Amendment rights to detain defendant solely for the purpose of waiting on the drug dog and the criminal history report unless (1) reasonable suspicion to justify further detention developed during the initial five minutes of the stop, United States v. Mesa, 62 F.3d at 162[5] or (2) due to the rapidity of the occurrence of events, the dog alerted[6] before the purposes of the original traffic stop were completed. Id.

This case is more like Bradshaw and United States v. Palomino, 100 F.3d 446 (6th Cir. 1996) than Mesa. In Mesa,

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[5]An unconstitutional seizure can occur even if the seizure is only momentary. United States v. Buchanon, 2 F.3d 1217, 1225 (6th Cir. 1995).

[6]Once the dog alerted on the car, there was justification for further detention of defendant and for searching his automobile. This will be discussed, infra.

the defendant was detained for "a considerable period of time." 62 F.3d at 163. She had signed a warning citation and it had been returned to the officer. The purpose of the initial traffic stop was complete. Nonetheless, the officer proceeded to ask defendant further questions while she was confined in the back of his police vehicle. 62 F.3d at 161.

The Court held that this was an abuse of authority. 62 F.3d at 162.

In Bradshaw, the defendant was stopped on a Memphis street because his "drive-out" tag was apparently altered. Defendant got out of his car and appeared nervous when the officer approached defendant's vehicle. Defendant was told to get into the back seat of the police vehicle. he officer performed a radio check on defendant's driver's license and registration. The defendant was issued a citation for a vehicle registration and inspection violation. Performing the radio checks and issuing the citation took approximately 20 minutes. During this period of time another officer stopped at the scene to assist and saw marijuana and a gun in defendant's car, in plain view. The court upheld the actions of the police officer who made the stop in placing the defendant in the police vehicle while the radio checks were done and the citation was written and upheld the plain view search as being within the scope of the original traffic stop. The court's analysis was as follows:

> Thus, the question becomes whether this detention exceeded the purpose and objective of the stop. We

> find it did not. Officer Kula began to write a traffic citation when the radio checks came back negative. It was during this time that Officer Cooper discovered the marijuana and the handgun, thereafter presenting them both to Officer Kula. Based upon these facts, the initial detention of Appellant in the police car clearly did not exceed the scope of the traffic stop. Officer Kula could lawfully detain Appellant until he finished performing the radio checks and issuing the citation; this would be well within the bounds of the initial stop.

Bradshaw, ____ F.3d ____, slip op. at 15-16.

In Palomino, a Shelby County, Tennessee, deputy sheriff was conducting a radar check on Interstate 240 at approximately midnight when he observed defendant's car traveling t a speed of approximately 42 miles per hour in a 55 miles per hour speed zone. The minimum speed in that area was 45 miles per hour, and defendant was driving on the left-hand, innermost lane of traffic. Other vehicles were having to pass defendant in the right-hand lane, and after the deputy sheriff pulled onto the interstate and followed defendant, defendant crossed two lanes of travel without using a signal and was weaving back and forth over the line separating the right-hand lane from the emergency lane. Suspecting that the driver might be intoxicated, the deputy sheriff pulled him over.

As the driver lowered the window of the car, the deputy sheriff smelled a strong chemical odor associated with ether-based cocaine. The defendant initially claimed ownership of the car and stated that he was going to visit someone in South Bend, Indiana. Later, defendant indicated that the vehicle belonged to his aunt and uncle, who were thinking of moving to Indiana, and he was driving it there for them. The deputy sheriff asked the defendant to step out of the car and questioned him about drinking, but ultimately determined that defendant was not intoxicated.

The deputy sheriff requested defendant to sit in the back of the patrol car while he checked defendant's license and the registration of the vehicle. The officer discovered that the registration was in order and that defendant had previously been arrested for a drug offense and money laundering. While the officer was issuing a warning citation, he asked defendant if he was carrying any illegal goods, drugs, or weapons. When defendant replied negatively, the officer asked if he would consent to a search of the car. Defendant signed a consent form to search the vehicle, and a search of the car revealed 11 kilograms of cocaine secreted in hidden compartments.

After noting its previous holding in Ferguson, the Sixth Circuit ruled that even if the deputy sheriff was motivated by a suspicion that defendant fit into a drug courier profile, the stop was not unreasonable because probable cause existed inasmuch as the evidence established that defendant had

committed traffic violations in the officer's presence. Therefore, the court ruled, the initial stop did not violate the Fourth Amendment.

Defendant in the Palomino case argued that after the officer determined that he was not intoxicated, ran a check on his driver's license and registration, and issued the citation, the officer unconstitutionally detained defendant for further questioning. The magistrate judge who heard the testimony, however, found that the officer had asked Palomino about illegal contraband while he was issuing the citation, and the Sixth Circuit accepted that finding and concluded that Palomino was not detained any longer than the time necessary for the original purpose of the stop when the officer asked him about the contraband and requested a consent to search. Therefore, the court concluded, the brief questioning and request for consent to search were constitutionally permissible.

In the instant case, the undersigned credits Officer Chamblee's testimony that defendant became nervous after he was asked to produce a business card and that several answers thereafter were preceded by an "uh" on his part. Also, defendant answered unresponsively when asked where he would be working in Houston.

The detention of defendant during the brief period between the stop and Billy's alerting on defendant's vehicle (14 to 15 minutes) did not exceed the scope of the original traffic stop. Moreover, under the totality of the

circumstances, defendant's nervousness and the way he answered Officer Chamblee's questions provided reasonable suspicion which also justified detention until the drug dog arrived and sniffed the car. Nervousness standing alone does not constitute reasonable suspicion, United States v. Mesa, 62 F.3d at 162, but Officer Chamblee's suspicions were aroused not only by defendant's nervousness but also by the fact that he appeared calm until asked for a business card and then gave a non-responsive answer to the question about where in Houston he was going to work. Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 2416 (1990); United States v. Roberts, 986 F.2d 1026, 1027 (6th Cir.), cert. denied, 114 S.Ct. 271 (1993). Officer Chamblee's call for a criminal history and the drug dog was based on more than a hunch. Some weight must be given to the instincts of a trained police officer who was dealing with a fluid, evolving situation which is quite unlike the orderly, detailed, retrospective development of the facts in connection with a motion to suppress.

It is inconsequential that traffic citations were not being written at the scene during the 14 to 15 minutes between the

time of the stop and Billy's alerting on the defendant's car. Defendant was ultimately charged with the two traffic violations and it would likely have taken at least 15 minutes to write them up at the scene of the stop. During the 14 to 15 minutes, Officer Chamblee checked defendant's driver's license and registration. The officers had witnessed two misdemeanor traffic violations and could have arrested defendant on those offenses.

Defendant's nervousness, his non-responsive answer, his hesitation in answering, the radio report that he had had a drug arrest in 1975, and Billy's alerting on defendant's car all occurred during this 14 to 15 minute period. The purposes of the original traffic stop (i.e., to cite defendant for the two traffic or possibly to issue him a warning) most likely could not have been completed during this short period of time and even so, under the totality of the circumstances, reasonable suspicion developed during this period justifying defendant's detention until Billy could do his work. The totality of circumstances must be considered when determining whether reasonable suspicion was present. United States v. Knox, 839 F.2d 285, 289 (6th Cir. 1988), cert. denied, 490 U.S. 1019 (1989).

Exposure of defendant's vehicle in a public place to a trained canine did not constitute a search within the meaning of the Fourth Amendment. United States v. Place, 452 U.S. 696, 707, 103 S.Ct. 2637, 2644-45 (1983). A positive identification by a properly trained dog is sufficient to

establish probable cause for the presence of a controlled substance. United States v. Diaz, 25 F.3d 392 (6th Cir. 1994). Once there was probable cause to believe drugs were in the vehicle, no warrant was needed in order to proceed with the search. United States v. Ross, 456 U.S. 798, 809-810, 102 S.Ct. 2157, 2164-2165 (1982).

The touchstone of Fourth Amendment law is reasonableness. Whren v. United States, 116 S.Ct. at 1776. ("It is of course true that in principle every Fourth Amendment case, since it turns on a 'reasonableness' determination, involves a balancing of all relevant factors."). Mr. Potts' privacy interests and property interests were not unreasonably interfered with under the circumstances set out above and his brief detention before probable cause was established was not unlawful.

III. Training and Reliability of the Drug Dog

Based on the facts set out above, there is ample proof that Billy was a properly trained and reliable drug dog. This contention lacks merit. United States v. Diaz, 25 F.3d at 393-396; United States v. Knox, 839 F.2d 285, 294 n.4 (6th Cir. 1988), cert. denied, 109 S.Ct. 1742 (1989). This contention is without merit.

IV. The "Second Search" of the Vehicle

Police officers are not required to conduct a search contemporaneously with the seizure of a vehicle. United States v. Johns, 469 U.S. 478, 105 S.Ct. 881 (1985). The continuation of the search of defendant's vehicle some 24 hours after defendant's arrest did not violate his Fourth Amendment rights. Id. The Mercedes Benz was both seized and subject to forfeiture at the time.

V. Conclusion

For the reasons stated, it is recommended that defendant's motion to suppress be **DENIED.**[7]

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[7]Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Failure to file objections within the time specified waives the right to appeal the District Court's order. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985). The district court need not provide de novo review where objections to this report and recommendation are frivolous, conclusive or general. Mira v. Marshall, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. Smith v. Detroit Federation of Teachers, 829 F.2d 1370 (6th Cir. 1987).

Respectfully submitted,

/s/ Robert P. Murrian

Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	)	FILED 4/1/97
	)	
v.	)	No. 3:94-cr-163
	)	
INMAN RAY McANDREW,	)	
BETTY McANDREW,	)	
DONALD WESLEY DODSON,	)	
MICHAEL CARROLL HENSLEY,	)	
DANIEL FRANKLIN POTTS,	)	
MELVIN BERARDNINO, and	)	
JOHN WESLEY GOSS	)	

MEMORANDUM AND ORDER

All pretrial motions in this case were referred to a United States magistrate judge of this district pursuant to 28 U.S.C. § 636(b) and the rules of this court. In a report and recommendation dated December 31, 1996, the United States magistrate judge recommended that the motion of defendant Daniel F. Potts to suppress evidence obtained from a warrantless search of his automobile on July 15, 1992, by officers of the Sulphur, Louisiana Police Department [Court

File #274] be denied. Defendant has filed timely objections to the report and recommendation.

The court has reviewed *de novo* the transcript of the suppression hearing held on September 30, 1996, the report and recommendation of the United States magistrate judge, and the defendant's objections to that report and recommendation. Based upon that review, the court is in agreement with the United States magistrate judge.

The evidence at the suppression hearing revealed that there was probable cause to support the initial stop of defendant's vehicle and that the detention of the defendant while the drug dog was summoned was only for a very short period of time and was reasonable under the circumstances; and that under the facts and circumstances, including defendant's nervousness, a non-responsive answer to one of the officer's questions, defendant's hesitation in answering, the radio report that defendant had a drug arrest in 1975, and the drug dog's alerting on defendant's car, there was probable cause to conduct a warrantless search of the vehicle.

Accordingly, the report and recommendation of the United States magistrate judge [Court File #278] is hereby ACCEPTED IN WHOLE, and defendant's motion to suppress [Court File #230] is DENIED.

E N T E R:

/s/ James H. Jarvis

James H. Jarvis

UNITED STATES DISTRICT JUDGE

97-6000

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	FILED 3/18/99
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
DANIEL F. POTTS,	)	
	)	
Defendant-Appellant.	)	

BEFORE: NELSON, CLAY and GIBSON,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the

case. Accordingly, the petition is denied. Judge Gibson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

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*Hon. John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

UNITED STATES CONSTITUTION, ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, United States Code, Section 1952(a) (1994)

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform --

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(b) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

Title 21, United States Code, Section 846 (1994)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.